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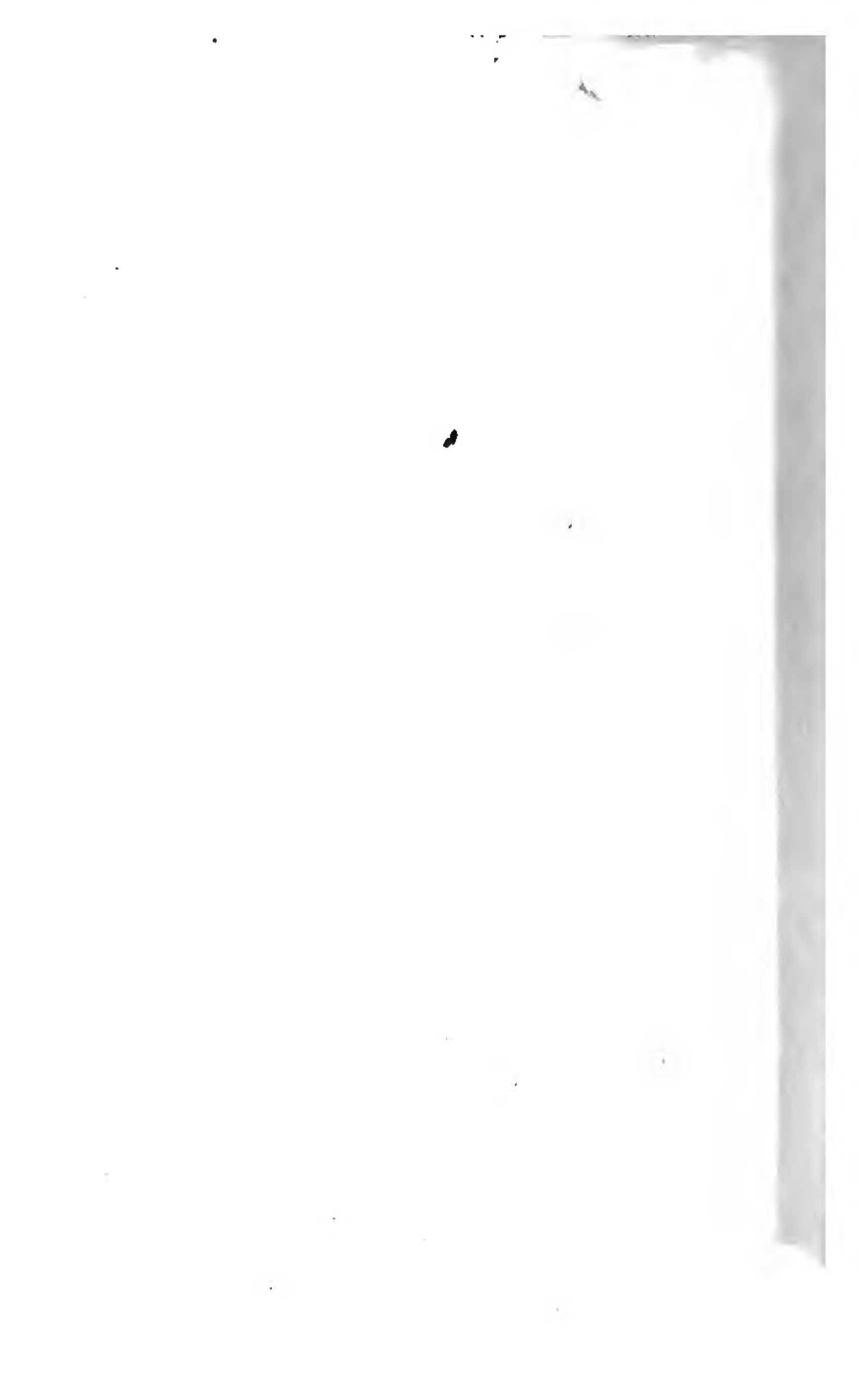
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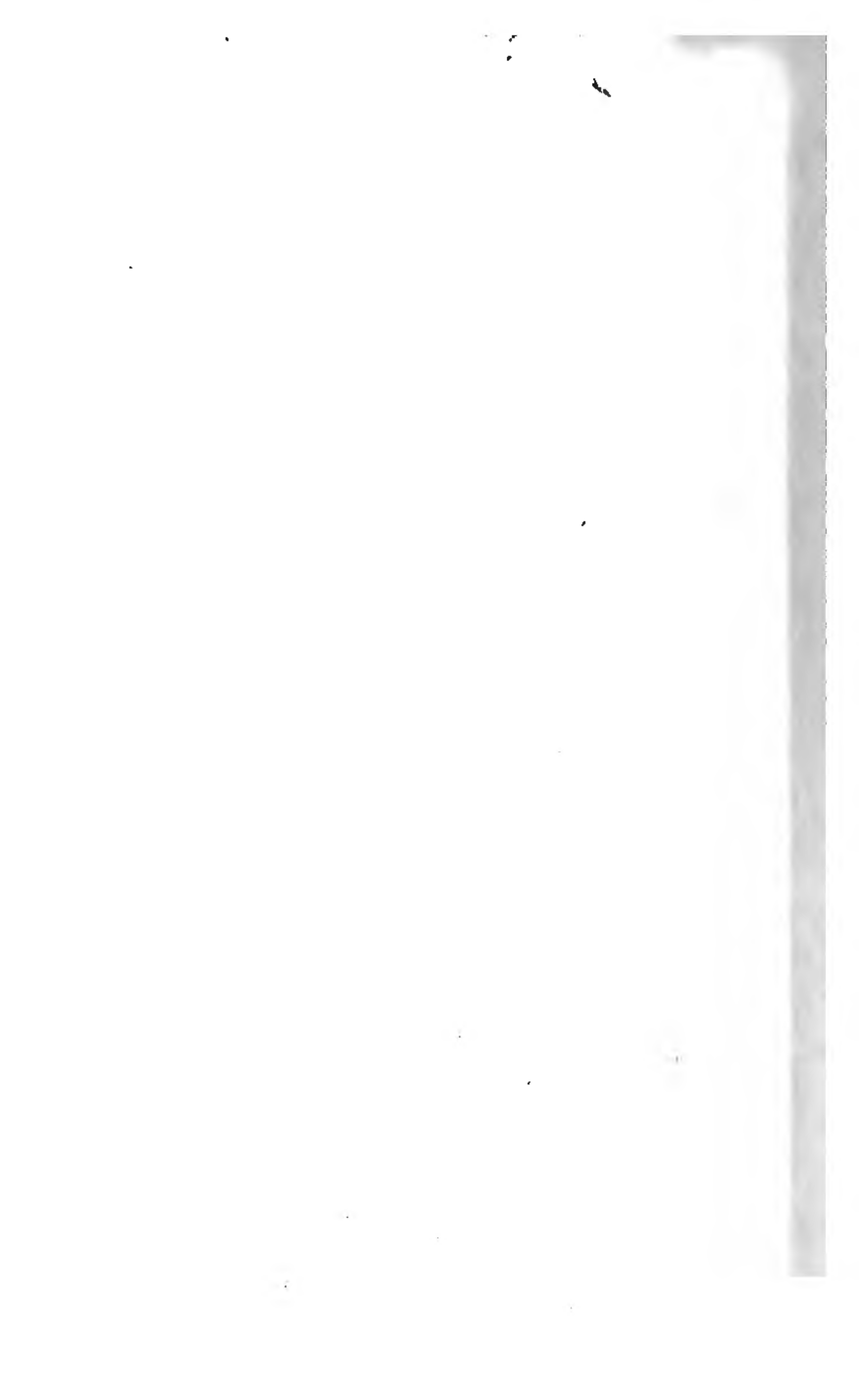


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A TREATISE ON THE LAW OF EVIDENCE

**BEING A CONSIDERATION OF THE
NATURE AND GENERAL PRINCIPLES OF EVIDENCE, THE INSTRUMENTS OF EVIDENCE
AND THE RULES GOVERNING THE PRODUCTION, DELIVERY AND USE OF EVIDENCE,
TOGETHER WITH INCIDENTAL MATTERS OF PRACTICE, INCLUDING ALSO
UNDER AN ALPHABETICAL ARRANGEMENT THE APPLICATION OF
THE RULES AND PRINCIPLES OF EVIDENCE TO PARTICULAR
ACTIONS, ISSUES AND PARTIES IN CIVIL, CRIMINAL,
EQUITY AND ADMIRALTY CASES, TOGETHER
WITH EVIDENCE IN COURTS MARTIAL**

**BY BYRON K. ELLIOTT
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and "APPELLATE PROCEDURE"**

IN FOUR VOLUMES

VOLUME IV

CRIMES, EQUITY, ADMIRALTY, COURTS-MARTIAL

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EVIDENCE IN PROSECUTIONS FOR CRIMES.

THE LAW OF EVIDENCE.

CHAPTER CXXVII.

GENERAL PRINCIPLES AND RULES.

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2703. Statutory crimes—Statutes affecting evidence.	2716. Criminal intent.
2704. Criminal capacity.	2717. Criminal intent—Direct evidence.
2705. Constitutional safeguards and privileges.	2718. Criminal intent—Circumstantial and presumptive evidence.
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	2732. Provinces of court and jury.
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§ 2702. Crimes—Definition and general principles.—A crime has been defined, in substance, and in general terms, as an act committed

or omitted in violation of a public law either forbidding or commanding it, as the case may be.¹ It is an offense or wrong, directly or indirectly affecting the public, for which the law has prescribed punishment and which is prosecuted by the sovereignty in its own name in a criminal proceeding.² The term usually includes misdemeanors as well as treason and felonies, and an attempt to commit a crime may itself be a criminal misdemeanor, although the crime attempted is only a misdemeanor. Generally speaking, it may be said that the rules of evidence, or at least the tests for its admission, are the same in criminal as in civil cases,³ and, for this reason, many of the rules that have been treated in the first and second volumes of this work are applicable to the subject of this volume and need not be repeated. But there is a fundamental difference in regard to the burden of proof or weight of evidence, as to criminal capacity and liability for an act in certain cases and as to various other matters. So, too, it is evident that what is relevant in the one case may not always be relevant in the other, and the rules are not altogether the same in regard to evidence of character and the like. So, there are certain defenses and certain constitutional safeguards and other privileges usually adopted for the protection of one accused of crime or to secure him a fair trial. These and similar matters will be treated in this chapter, with a general survey of the subject. Some matters, however, that relate particularly, or even exclusively, to criminal proceedings, such as confessions, dying declarations, and the like, have been already treated and will be considered in this volume only in connection with specific crimes.

¹ 4 Blackstone Comm. 15; *Butt v. Conant*, 1 B. & B. 548; *Greely v. Hamman*, 12 Colo. 95; *Slattery v. People*, 76 Ill. 220; *State v. Peterson*, 41 Vt. 511; *United States v. Eaton*, 144 U. S. 677, 12 Sup. Ct. 764.

² *Mann v. Owen*, 9 B. & C. 595, 17 E. C. L. 456; *People v. Williams*, 24 Mich. 163; 1 Bishop Cr. Law, § 32; "Crimes," says Edmund Burke, in the report of the committee appointed to inspect the Lords' Journals, "are the actions of physical beings, with an evil intention abusing their physical powers against justice, and to the detriment of society." 6

Burke Works (Bohn's Edition), 489.

³ Roscoe begins his work on "Criminal Evidence" with the statement that, "the general rules of evidence are the same in criminal and in civil proceedings," and quotes from *Watson's Case*, 2 Starkie N. P. 155, and *Murphy's Case*, 8 Car. & P. 306, to the same effect; see also, *Lord Melville's Trial*, 29 How. St. Tr. 746; *Summons v. State*, 5 Ohio St. 325, 352; *Crawford v. State*, 112 Ala. 1, 21 So. 214; *West v. State*, 22 N. J. L. 212.

§ 2703. **Statutory crimes—Statutes affecting evidence.**—In every state there are doubtless many statutory crimes that were unknown to the common law, and, in some states, it has been held that there are no common-law offenses in such states not defined or declared to be crimes or misdemeanors by statute,⁴ but where the statute uses common-law terms or does not particularly define the crime, the courts will usually look to the common-law definition.⁵ A discussion of the power of the legislature over the subject of crimes, and of numerous statutory offenses, will be found in the note referred to below.⁶ The evidence necessary to prove a statutory offense is, of course, largely determined by the elements of the offense as defined or made essential by the statute. As elsewhere shown, the legislature cannot arbitrarily create a conclusive presumption of guilt where none could reasonably be inferred,⁷ but laws which prescribe the evidential force of certain facts by enacting that upon proof of such facts a given presumption shall arise, or which determine what facts shall constitute a *prima facie* case against the accused, casting the burden of proof upon him of disproving or rebutting the presumption, are not generally regarded as unconstitutional, and such statutes, within the constitutional limits, are not necessarily invalid.⁸

§ 2704. **Criminal capacity.**—In order that a person should be punished as the perpetrator of a crime he must have criminal capacity. There are two principal classes of those who may lack criminal capacity, namely, infants and persons of unsound mind, and there are certain cases in which duress, coercion or constraint have been held to amount practically to want of criminal capacity.⁹ So, too, while volun-

⁴ See, *State v. DeWolfe*, (Neb.) 93 N. W. 746; *Estes v. Carter*, 10 Iowa 400; *Smith v. State*, 12 Ohio St. 466, 80 Am. Dec. 355; *Allen v. State*, 10 Ohio St. 287; *Stephens v. State*, 107 Ind. 185, 8 N. E. 94; *Rosenbaum v. State*, 4 Ind. 599; *State v. Williams*, 7 Rob. (La.) 252.

⁵ *State v. Berdetta*, 73 Ind. 185, 38 Am. R. 117; *Hedderich v. State*, 101 Ind. 564; *State v. De Wolfe*, (Neb.) 93 N. W. 746; *Mitchell v. State*, 42 Ohio St. 385. But the statute must not be so indefinite that the court cannot tell what was intended. *Cook*

v. State, 25 Ind. App. 278, 59 N. E. 489.

⁶ *Booth v. People*, 186 Ill. 43, 78 Am. St. 235-274, note.

⁷ See, Vol. I. § 87.

⁸ Vol. I, § 86; see also, *State v. Kyle*, 14 Wash. 550, 45 Pac. 147; *Commonwealth v. Smith*, 166 Mass. 370, 44 N. E. 503; *State v. Beach*, 147 Ind. 74, 46 N. E. 145, 36 L. R. A. 179; *Wong Hane, In re*, 108 Cal. 680, 41 Pac. 693; *People v. Cannon*, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. 668, and note.

⁹ See, *State v. Baker*, 110 Mo. 7, 19

tary drunkenness is no excuse, or at least no justification, for many acts, yet intoxication may operate or tend to operate to take away criminal capacity, especially where a deliberate intent is required in the mind of the party at the time of his act as an essential element of the crime. But one may be an infant over a certain age, or of unsound mind in some respect, or more or less intoxicated or the like, and still have criminal capacity. Whether he has or not will depend largely upon the character or degree of his infirmity, or the like, and upon the nature of the alleged crime. The presumptions that have been adopted in the case of infants, as to criminal capacity, have been considered elsewhere,¹⁰ and insanity and drunkenness will be considered when we come to treat defenses.

§ 2705. Constitutional safeguards and privileges.—It is an old maxim of the law that no one is bound to criminate himself, and while this may have been originally “a mere rule of evidence,” it is now embodied in the constitutions of the different states and in the constitution of the United States as well. Other safeguards and privileges are also provided, among which are security against unlawful and unreasonable searches and seizures, the right to trial by jury, security against being put twice in jeopardy for the same offense, and the right of an accused to be confronted by the witnesses against him. These matters, however, have nearly all been fully treated,¹¹ except the provision as to jeopardy, which will be considered in another section. Under most, if not all, of the modern statutes the accused may become a witness if he so desires, but he is not obliged to, and if he does he is, in general, subject to cross-examination and impeachment the same as any other witness, so long as his constitutional rights or privileges, not in some way expressly waived by him, are not invaded.¹² Many of the statutes also provide that the accused may

S. W. 222, 224, 225, and cases cited; *Commonwealth v. Flaherty*, 140 Mass. 454, 5 N. E. 258; *State v. Davis*, 15 Ohio 72; *Goldstein v. People*, 82 N. Y. 231, as to the presumption in case of husband and wife; see also, *Commonwealth v. Daley*, 148 Mass. 12, 18 N. E. 579; *State v. Fertig*, 98 Iowa 139, 67 N. W. 87; 1 Hale P. C. 50, 51; 1 Russell Crimes 18, 22; as to hypnotism, see, *People v. Worthington*, 105 Cal. 166, 38 Pac. 689.

¹⁰ See, Vol. I, §§ 80, 125, also chapter on Infancy, Vol. III, ch. 108.

¹¹ That a witness cannot be compelled to criminate himself, see, Vol. II, §§ 1001-1012; as to unlawful searches and seizures, criminating documents and corporal inspection, see, Vol. II, §§ 1013, 1014; as to the right to confront the witness, see, Vol. II, § 1195.

¹² Vol. II, § 988; also, *Hanoff v. State*, 37 Ohio St. 178; *Stalcup v.*

take and read depositions of witnesses residing out of the state, or the like, if he waived his right to be confronted by the witnesses and consents in the manner provided by the statute to the taking and reading of depositions of witnesses by the state upon the same matter. Such statutes are not unconstitutional, and, if he so consents and waives his privilege, depositions may be so taken and read, in a proper case, by the prosecution.¹³

§ 2706. Burden of proof—Reasonable doubt.—The presumption is in favor of innocence,¹⁴ and for this reason, even if there were no other, the burden of proof would ordinarily be upon the prosecution. But, for other good reasons, it is settled by the criminal law that the burden is upon the prosecution to prove the guilt of the accused, not merely by a preponderance of the evidence, but beyond a reasonable doubt.¹⁵ As stated in another volume, and as will be shown hereafter in considering particular defenses and classes of crimes, the better rule is that the burden remains throughout the trial upon the

State, 146 Ind. 270, 45 N. E. 334; State v. Harvey, 131 Mo. 339, 32 S. W. 1110; People v. Foo, 112 Cal. 17, 44 Pac. 453; State v. Kirkpatrick, 63 Iowa 554, 19 N. W. 660; State v. McGuire, 15 R. I. 23; Peck v. State, 86 Tenn. 259, 6 S. W. 389.

¹³ Butler v. State, 97 Ind. 373; Vol. II, § 1195; see also, as to the use of evidence taken at a preliminary hearing, and also as to waiver of the constitutional privilege, State v. Nelson, 68 Kans. 566, 75 Pac. 505; Davis v. Commonwealth, (Ky.) 77 S. W. 1101; State v. Banks, 111 La. Ann. 22, 35 So. 370; People v. Welsh, 88 App. Div. (N. Y.) 65, 84 N. Y. S. 703; State v. Cushing, 17 Wash. 544, 50 Pac. 512; Mattox v. United States, 156 U. S. 237, 15 Sup. Ct. 337; State v. Minard, 96 Iowa 267, 65 N. W. 147; State v. Bowker, 26 Ore. 309, 38 Pac. 124; see also, Cooley Const. Lim. (6th ed.) 387.

¹⁴ Vol. I, §§ 94, 95; Ogletree v. State, 28 Ala. 693; People v. Graney, 91 Mich. 646, 52 N. W. 66; Farley v.

State, 127 Ind. 419, 26 N. E. 898; Williams v. State, 35 Tex. Cr. App. 606, 34 S. W. 943; State v. Krug, 12 Wash. 288, 41 Pac. 126.

¹⁵ Prince v. State, 100 Ala. 144, 14 So. 409, 46 Am. St. 28; Green v. State, 38 Ark. 304; People v. Woody, 45 Cal. 289; Boykin v. People, 22 Colo. 496, 45 Pac. 419; Wallace v. State, 41 Fla. 547, 26 So. 713; Watt v. People, 126 Ill. 9, 18 N. E. 340; Guetig v. State, 63 Ind. 278; State v. Trout, 74 Iowa 546, 38 N. W. 405, 7 Am. St. 499; People v. Beckwith, 108 N. Y. 67, 15 N. E. 53; State v. Taylor, 57 S. Car. 483, 35 S. E. 729, 76 Am. St. 575; Pilkinton v. State, 19 Tex. 214; State v. Meyer, 58 Vt. 457, 3 Atl. 195; Tilley v. Commonwealth, 90 Va. 99, 17 S. E. 895; 1 Starkie Ev. 478; 1 Hale P. C. 300; Flake v. State, 121 Ind. 433, 23 N. E. 273, 16 Am. St. 410, note; 23 Am. St. 688, note; 25 Am. St. 21, note, and numerous authorities herein-after cited.

prosecution to satisfy the jury of the guilt of the accused beyond a reasonable doubt.¹⁶ But when the defendant pleads any substantive, distinct and independent matter as a defense, which upon its face does not necessarily constitute an element of the transaction with which he is charged, it has been said that the burden of proving such defense devolves upon him.¹⁷ The accused, to make such matter available as a defense, must usually introduce evidence to prove the independent exculpatory facts upon which he relies, and in this respect and to this extent it is, perhaps, correct to say, in one sense at least, that the burden is on him. But, notwithstanding this, if, after all the evidence is in, it is found that upon the whole case the prosecution has not sustained the burden of proof of satisfying or convincing the jury of his guilt beyond a reasonable doubt, he should be acquitted. It has also been said that if the non-existence of some fact, or the non-performance of some duty, is a constituent and essential element in the crime with which he is charged, the burden of proving this negative allegation of non-existence or non-performance is upon the state. But if a fact is peculiarly within the knowledge of the accused, as, for example, his own age when he pleads non-age as a defense, or the fact that he has a license to carry on a prohibited business or to do a forbidden act, the burden of proof is said to be on him, as he has much better means of proving the fact alleged than the prosecution has of proving the contrary. The matter is peculiarly within his knowledge, and to require the state to prove the lack of a license is to require proof of a negative allegation.¹⁸ But even where this is true the jury should still acquit if there is a reasonable doubt, upon the whole evidence, of the defendant's guilt.

¹⁶ See, Vol. I, §§ 95, 126; for a presentation of the opposite view, see, Wharton Cr. Ev., § 322; "The onus of proving every thing essential to the establishment of the charge against the accused," says Mr. Burrill, "lies on the prosecutor." Burrill Circ. Ev. 728.

¹⁷ See, Commonwealth v. McKee, 1 Gray (Mass.) 61; Underhill Cr. Ev., § 23.

¹⁸ Underhill Cr. Ev., § 24; see also,

Ellis v. State, 30 Tex. App. 601, 18 S. W. 139; State v. McCaffrey, 69 Vt. 85, 37 Atl. 234; Sharp v. State, 17 Ga. 290; Commonwealth v. Zelt, 138 Pa. St. 615, 21 Atl. 7; State v. Crow, 53 Kans. 662, 37 Pac. 170; State v. Keggon, 55 N. H. 19; People v. Townsey, 5 Denio (N. Y.) 70; People v. Maxwell, 83 Hun (N. Y.) 157, 31 N. Y. S. 564; State v. Kriebbaum, 81 Iowa 633, 47 N. W. 872; Black Intox. Liq., § 507.

§ 2707. **Reasonable doubt.**—The term “reasonable doubt” is well understood, but not easily defined, and it has been suggested that the words themselves probable convey their meaning to the mind of the ordinary juror as well as any definition that could be given.¹⁹ In a number of cases it has been defined as a doubt that “the jury are able to give a reason for” or “for which a good reason can be given,” but this adds little to the understanding of the subject and has been criticised as calculated to mislead.²⁰ It is generally agreed that such a doubt must be an actual and substantial doubt growing out of the evidence, and not a mere vague apprehension or merely possible, captious, speculative or imaginary doubt,²¹ but the two phrases “beyond a reasonable doubt” and “to a moral certainty” are usually regarded as practically synonymous.²² The question as to whether each fact, especially where the evidence is circumstantial, must be proved beyond a reasonable doubt, and the distinction between links in the chain and mere subsidiary facts or items will be considered in a subsequent section.²³

¹⁹ *Wall v. State*, 51 Ind. 453, 465; *Siberry v. State*, 133 Ind. 677, 33 N. E. 681; *State v. Reed*, 62 Me. 129, 142; see also, *Dunbar v. United States*, 156 U. S. 185, 15 Sup. Ct. 325; *State v. Morey*, 25 Ore. 241, 35 Pac. 655, 36 Pac. 573; 48 Am. St. 566, note.

²⁰ Conflicting authorities as to whether such an instruction should be given to the jury are reviewed in the note in 48 Am. St. 566, 574, 575.

²¹ *Fowler v. State*, 100 Ala. 96, 14 So. 860; *Hornsby v. State*, 94 Ala. 55, 10 So. 522; *McGuire v. People*, 44 Mich. 286, 6 N. W. 669, 38 Am. R. 265, and note; *People v. Cox*, 70 Mich. 247, 38 N. W. 235; *Earll v. People*, 73 Ill. 329; *State v. Rounds*, 76 Me. 123; *State v. Turner*, 110 Mo. 196, 19 S. W. 645; *Lovett v. State*, 30 Fla. 142, 11 So. 550; *United States v. Cassidy*, 67 Fed. 698; *State v. Roberts*, 15 Ore. 187, 13 Pac. 896; *People v. Guidici*, 100 N.

Y. 503, 3 N. E. 493; many examples of instructions held proper and of others held improper are given in the note to *Burt v. State*, 72 Miss. 408, 16 So. 342, 48 Am. St. 563, 566, 570–578; see also, for a review of many cases and statements therein as to what is or is not a reasonable doubt, *Lovett v. State*, 30 Fla. 142, 11 So. 550, 17 L. R. A. 705–711.

²² *Jones v. State*, 100 Ala. 88, 14 So. 772; *Commonwealth v. Costley*, 118 Mass. 1; *Carlton v. People*, 150 Ill. 181, 37 N. E. 244, 41 Am. St. 346; *State v. Whitson*, 111 N. Car. 693, 16 S. E. 332.

²³ See, however, upon that subject, *Wade v. State*, 71 Ind. 535; *Carlton v. People*, 150 Ill. 181, 37 N. E. 244, 41 Am. St. 346; *Siebert v. People*, 143 Ill. 571, 32 N. E. 431; *Fowler v. State*, 100 Ala. 96, 14 So. 860, with which compare, *Graves v. People*, 18 Colo. 170, 32 Pac. 63; *People v. Ah Chung*, 54 Cal. 398; *State v. Crane*, 110 N. Car. 530, 15 S. E. 231.

§ 2708. *Corpus delicti*—Circumstantial evidence.—The proof of the charge in prosecutions for crimes involves the proof of two distinct matters: First, that the act itself was done; and, secondly, that it was done by the person charged, in other words, proof of the *corpus delicti*, or body of the crime, and proof of the identity of the accused.²⁴ It is seldom that either of these can be proved by direct testimony, and either may be established in a proper case, by circumstantial evidence. Even in the case of homicide, though ordinarily there ought to be the testimony of persons who have seen and identified the body, yet this is not absolutely necessary in cases where the proof of the death is so strong as to produce the full assurance of moral certainty,²⁵ or, in other words, to satisfy the jury beyond a reasonable doubt.²⁶ The *corpus delicti* of homicide must, however, be proved, as a rule, either by showing that the party alleged to have been killed is actually dead, by finding and identifying his corpse, or by showing that the murder was accomplished or accompanied by the employment of violence, or the like, in such a manner as to sufficiently account for the disappearance of the body and render direct evidence of its whereabouts or appearance impossible to be obtained.²⁷ In regular order, evidence of the *corpus delicti* should properly precede evidence tending to implicate the defendant in its commission, and

²⁴ Winslow v. State, 76 Ala. 47; Smith v. State, 133 Ala. 145, 31 So. 806, 91 Am. St. 21, and note; Willard v. State, 27 Tex. App. 386, 11 S. W. 453, 11 Am. St. 197. "A *corpus delicti* may be considered as always made up of two constituent parts; first, certain general facts, forming its basis, exclusive of criminative indications of any kind; as, in a case of alleged homicide, the fact of death (involving the physical fact of the existence of a dead body, and its identification, when possible); and secondly, certain other facts showing the existence of a criminal agency as the cause of the former." Burrill Circ. Ev. 677.

²⁵ Wills Circ. Ev. 157, 162; Rex v. Hindmarsh, 2 Leach C. C. 651; People v. Alviso, 55 Cal. 230.

²⁶ State v. Williams, 7 Jones L. (N. Car.) 446; McCulloch v. State, 48 Ind. 109; United States v. Williams, 1 Cliff. (U. S.) 5, 21; see also, Zoldoske v. State, 82 Wis. 580, 52 N. W. 778; Anderson v. State, 20 Fla. 381; Johnson v. Commonwealth, 81 Ky. 325; State v. Keeler, 28 Iowa 551; State v. Dineen, 10 Minn. 407.

²⁷ Underhill Cr. Ev., § 7, citing, Smith v. Commonwealth, 21 Gratt. (Va.) 809, 820; Pitts v. State, 43 Miss. 472, 481; State v. Keeler, 28 Iowa 551, 553; Lancaster v. State, 91 Tenn. 267, 18 S. W. 777; Ruloff v. People, 18 N. Y. 179; State v. Winner, 17 Kans. 298; State v. Dickson, 78 Mo. 438; State v. Davidson, 30 Vt. 377, 386.

while the court may, in its discretion, vary the order in which the evidence is introduced, evidence must be given establishing the *corpus delicti* beyond a reasonable doubt, or a judgment of conviction will not be sustained by the evidence.²⁸ It seems to have been held at one time that the *corpus delicti*, at least in cases of homicide, must be proved by direct evidence;²⁹ but the modern rule, as already stated, is that in any proper case it, as well as other facts, may be proved by circumstantial evidence satisfying the jury beyond a reasonable doubt.³⁰

§ 2709. Circumstantial evidence—Must exclude every reasonable hypothesis other than that of guilt.—It is laid down as a general rule by Mr. Burrill that “the hypothesis of delinquency or guilt should flow naturally from the facts proved, and be consistent with them all.”³¹ It certainly cannot be, however, that the hypothesis of guilt must be consistent with each and every minor fact of which there is some evidence, and the statement quoted was certainly not intended to have any such meaning. But the established rule may, in other respects, be stated in even stronger terms. There is some difference in the phrasing of the rule by the various courts, but it is settled in substance, with little dissent, that, in order to justify a conviction on circumstantial evidence it should not only be consistent with the inference of guilt, but also be incompatible or inconsistent with any other reasonable hypothesis.³² Indeed, it is sometimes said that the

²⁸ Traylor v. State, 101 Ind. 65.

²⁹ See, Hale P. C. 290; Reg. v. Burdett, 4 B. & Ald. 95.

³⁰ Willard v. State, 27 Tex. App. 386, 11 S. W. 453, 11 Am. St. 197, and note; People v. Palmer, 109 N. Y. 110, 16 N. E. 529, 4 Am. St. 423, and note; State v. Cardelli, 19 Nev. 319, 10 Pac. 433; Smith v. State, 133 Ala. 145, 31 So. 806, 91 Am. St. 21, and note; Campbell v. People, 159 Ill. 9, 42 N. E. 123, 50 Am. St. 134; 78 Am. Dec. 252-259, note.

³¹ Burrill Circ. Ev. 735.

³² State v. Levy, (Idaho) 75 Pac. 227; Sherrill v. State, 138 Ala. 3, 35 So. 129; State v. Terrio, 98 Me. 17, 56 Atl. 217; State v. Johnson, 19 Iowa 230; State v. Miller, 9

Houst. (Del.) 564, 571; Echols v. State, 81 Ga. 696, 699, 8 S. E. 443; Green v. State, 51 Ark. 189, 10 S. W. 266; James v. State, 45 Miss. 572, 575; State v. Asbell, 57 Kans. 398, 46 Pac. 770; People v. Ward, 105 Cal. 335, 38 Pac. 945; People v. Shuler, 28 Cal. 490, 496; Wright v. State, 21 Neb. 496, 32 N. W. 576; People v. Aiken, 66 Mich. 460, 33 N. W. 821; Wantland v. State, 145 Ind. 38, 43 N. E. 931; Cavender v. State, 126 Ind. 47, 48, 25 N. E. 875; Sumner v. State, 5 Blackf. (Ind.) 579, 36 Am. Dec. 561; United States v. Reder, 69 Fed. 965; Hamilton v. State, 96 Ga. 301, 22 S. E. 528; Smith v. State, 35 Tex. Cr. App. 618, 33 S. W. 339, 34 S. W. 960; Webb

evidence must show the defendant's guilt, or exclude every other reasonable hypothesis to a moral certainty,³³ but it seems to us that this form of statement is apt to mislead, and it is not, of course, required that it should be shown that it was absolutely impossible that another might have been the perpetrator of the crime.³⁴ The general rule upon the subject is thus stated in a recent case: "In attempting to prove a fact by circumstantial evidence there are certain rules to be observed that reason and experience have found essential to the discovery of truth and the protection of innocence. The circumstances themselves must be established by direct proof and not left to rest upon inferences. The inference which is to be based upon the facts and circumstances so proved must be a clear and strong logical inference, an open and visible connection between the facts found and the proposition to be proved. When a criminal charge is sought to be sustained wholly by circumstantial evidence, the hypothesis of guilt or delinquency should flow naturally from the facts and circumstances proved and be consistent with them all. The evidence of facts and circumstances must be such as to exclude, to a moral certainty, every hypothesis but that of guilt of the offense imputed, or, in other words, the facts and circumstances must not only all be consistent with and point to the guilt of the accused, but they must be inconsistent with his innocence."³⁵

§ 2710. Circumstantial evidence—Elements and classification.—It is almost impossible to enumerate or classify all the elements of circumstantial evidence, or the facts and circumstances that may be re-

v. State, 73 Miss. 456, 19 So. 238; Baldez v. State, 37 Tex. Cr. App. 413, 35 S. W. 664; Morgan v. State, 51 Neb. 672, 71 N. W. 788; State v. Avery, 113 Mo. 475, 495, 21 S. W. 193; State v. Miller, 100 Mo. 606, 626, 13 S. W. 832, 1051; Commonwealth v. Goodwin, 14 Gray (Mass.) 55; Chitlister v. State, 33 Tex. Cr. App. 635, 638, 28 S. W. 683; Kennedy v. State, 31 Fla. 428, 12 So. 858; State v. Davenport, 38 S. Car. 348, 352, 17 S. E. 37; Carlton v. People, 150 Ill. 181, 37 N. E. 244; Gannon v. People, 127 Ill. 507, 521, 21 N. E. 525; Commonwealth v. Costley, 118 Mass. 1; Coleman v.

State, 26 Fla. 61, 7 So. 367; Lancaster v. State, 91 Tenn. 267, 18 S. W. 777. Or as it is sometimes said, it must exclude every other reasonable hypothesis than that of the defendant's guilt.

³³ See, Burrill Circ. Ev. 737; Jones v. State, 100 Ala. 88, 14 So. 772; see also, Commonwealth v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711, and note.

³⁴ Findley v. State, 5 Blackf. (Ind.) 576, 36 Am. Dec. 557; Sumner v. State, 5 Blackf. (Ind.) 579, 36 Am. Dec. 561.

³⁵ People v. Fitzgerald, 156 N. Y. 253, 258, 50 N. E. 846.

ceived as evidence of guilt or in exculpation. "In truth," says Burke, "it seems a wild attempt to lay down any rule for the proof of intention by circumstantial evidence; all the acts of the party; all things that explain or throw light on these acts; all the acts of others relative to the affair that come to his knowledge and may influence him; his friendships and enmities; his promises; his threats; the truth of his discourses; the falsehood of his apologies, pretenses and explanations; his books; his speech; his silence where he was called to speak; everything which tends to establish the connection between all these particulars; every circumstance, precedent, concomitant and subsequent, become parts of circumstantial evidence. These are in their nature infinite, and cannot be comprehended within any rule, or brought under any classification."³⁶ Mr. Burrill, however, has classified them as follows: "I. Criminative or exculpatory evidence, as derived: (1) From physical or external objects or appearances; (2) from the conduct or position of the accused himself; (a) before the commission of the supposed crime; (b) at or about the time of its commission; (c) afterwards. II. Exculpatory evidence or considerations, as derived: (1) from the exculpatory evidence adduced; (2) from new and distinct evidence."³⁷ A brief explanation of these matters will be given in the sections immediately following and the most important will be more fully treated in subsequent sections.

§ 2711. Circumstantial evidence—Physical or external objects and appearances.—The physical or external objects and appearances are such as the person killed, the building burned or other subject of the offense, its appearances and various marks, the instruments of the offense and their appearances, the place and its appearances, sounds, smells and the like, symptoms of poison, objects of dress, and the like found at the place of the crime, fruits of the offense, and the like. (a) Some of these physical facts and appearances go merely to show the *corpus delicti*, or to show whether a crime has been committed. (b) Others go to indicate the particular perpetrator, or to prove that the accused was concerned in the crime, as principal or accessory. "A *corpus delicti* is shown by such facts as indicate a distinct criminal human agency; or, in other words, by those facts which go to negative the supposition or hypothesis that the appearances observed could have been the result of natural causes, or of accident, or of the act of the

³⁶ Burke Work (Bohn's ed.), 489. ³⁷ Burrill Circ. Ev. 251.

party injured or slain, or of any irresponsible agency. In cases of alleged murder, the most important facts for this purpose are the appearances presented by the body, when found—its condition, whether buried or otherwise concealed, stripped of clothing, or otherwise—its position and attitude—the marks of violence upon it; if wounds, their nature, number and direction—the particular appearance of bodies found in the water, or suspended by the neck, and the like. In many cases the opinions of medical men, based upon actual inspection and examination, are necessarily sought for and relied on. In cases of alleged poisoning, these professional examinations become of peculiar importance, involving the dissection of the body, to a greater or less extent, and the application of chemical or other tests, for the purpose of detecting the presence of poison in it. Other facts which go to show that a crime has been committed, are, in cases of murder, rape and robbery, the presence of footmarks, other than those of the deceased or assaulted person, at the scene of the crime; marks of struggles or resistance to violence; stains of blood in the vicinity; cries of distress; sounds as of falling bodies; the clothing of the deceased or assaulted person, disordered, torn, stripped off or scattered about; pockets rifled of their contents, and the like. The participation of the accused in the crime proved to have been committed is shown by those physical facts or appearances which connect him with it; affording so many natural coincidences, harmonizing with the supposition of his guilt. They are, in other words, the traces, marks or indications, more or less distinct and impressive, of the presence of a particular criminal agent; and they may be considered under two principal divisions; first, traces or indications at the scene of the crime, derived or supposed to be derived from his person; and secondly, traces or indications upon or near his person, derived or supposed to be derived from participation in the crime.”²⁸

§ 2712. Circumstantial evidence—Conduct and relations of accused.—The criminative or exculpatory circumstantial evidence derived from the relations, position and conduct of the accused party himself may be, as suggested by Burke, either precedent, concomitant or subsequent.²⁹ “In tracing the connection between a crime and the person suspected or accused of it, as indicated by his previous conduct and position,” says Burrill, “the circumstances to be inquired into

²⁸ Burrill Circ. Ev. 262.

²⁹ See also, *Rex v. Donnellan*, Wills Cr. Ev., 30, 85, 241.

naturally occur in the following order: First, his character, as generally disposing or inclining him to the offense. Secondly, the particulars of his external situation and relation, as more immediately instigating him to its commission; or, in other words, as presenting motives to the offense, including also the contemplating of the necessary means of committing it. Thirdly, language indicative of existing disposition, or design; comprising remote allusions to the act in contemplation; expressions of animosity against the subject of it; and actual declarations of intention, or utterance of threats to commit it; all showing the impression of a motive, and the existence of a purpose, more or less distinctly formed or entertained. Fourthly, preparations for committing the offense; showing the motive in its fullest operation, and a purpose fixed and matured. Fifthly, opportunities and facilities, including the actual possession of the means for committing the crime; serving often to impart additional strength to motives. Lastly, actual attempts, stopping short only of full and effectual perpetration. But, as the law does not allow general character to be adduced, in the first instance, in evidence, as a criminative circumstance, judicial investigation must commence from a lower point in the series above indicated, and cannot go farther back than those circumstances which tend to show a motive on the part of the accused."⁴⁰ The concomitant circumstances are such, in the main, as are part of the *res gestae*, but under this head may also be included not only such as are precisely contemporaneous with the transaction, but also such as immediately precede or follow it. The presence of the accused at the scene of the crime or his proximity thereto about the time of its commission, is an example of such a circumstance, and evidence of footprints, preparation and other conduct and movements of the accused about the time is often admissible. Subsequent conduct, such as the fabrication or suppression of evidence, flight, possession of stolen goods or fruits of the crime, demeanor and conduct of the accused when arrested or charged with the crime, and the like, may also be shown in a proper case.

§ 2713. Circumstantial evidence—Proof of every link beyond reasonable doubt.—It has often been said that "no chain is stronger than its weakest link" and that each necessary link in the chain of evidence must be proved beyond a reasonable doubt in order to sus-

*Burrill Circ. Ev. 280, 281; see also, *Bulloch v. State*, 10 Ga. 47, 54 Am. Dec. 369.

tain a verdict of guilty in a criminal case resting upon circumstantial evidence.⁴¹ Rightly understood, this is doubtless true. But it has also been said that the doctrine of reasonable doubt does not, as a rule, apply to mere matters of subsidiary evidence, taken item by item, which may aid in proving the essential facts, but only to the essential facts which establish the defendant's guilt; and if such facts are fully proved so that the jury is convinced of defendant's guilt beyond a reasonable doubt, he may properly be convicted.⁴² We do not understand, however, that there is necessarily any conflict between these two statements, and the subject is thus explained in a recent case: "It is not necessary that each essential fact in the chain of evidence solely relied on to connect the accused with the commission of the offense, when separately considered, be found beyond reasonable doubt. Such a fact, though having little to sustain it when standing alone, may derive such support from others immediately connected therewith as to exclude all doubt of its existence. Nevertheless, if conviction depends entirely on different circumstances, arranged linkwise, connecting the defendant with the crime charged, then each and every one of these must be established beyond a reasonable doubt, for no chain can be stronger than its weakest link. Not so, however, with the minor circumstances relied on by the state to establish the ultimate and essential facts upon which conviction depends. Some of these may fail of proof, and yet those essential to conviction be found from other evidence beyond a reasonable doubt."⁴³

⁴¹ *People v. Aiken*, 66 Mich. 460, 33 N. W. 821, 11 Am. St. 512; *Sumner v. State*, 5 Blackf. (Ind.) 579, 36 Am. Dec. 561; *Horne v. State*, 1 Kans. 42, 81 Am. Dec. 499, and note; *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711, and note; *Kollock v. State*, 88 Wis. 663, 60 N. W. 817; *Marion v. State*, 20 Neb. 233, 29 N. W. 911, 57 Am. R. 825; *State v. Furney*, 41 Kans. 115, 21 Pac. 213, 13 Am. St. 262; *State v. Gleim*, 17 Mont. 17, 41 Pac. 998, 52 Am. St. 655; *Clara v. People*, 9 Colo. 122, 10 Pac. 799; *People v. Phipps*, 39 Cal. 333; *Crow v. State*, 33 Tex. Cr. App. 264, 26 S. W. 209;

78 Am. Dec. 253, note; 62 Am. Dec. 182, note.

⁴² *Hauk v. State*, 148 Ind. 238, 254, 46 N. E. 127, 47 N. E. 465; *Goodwin v. State*, 96 Ind. 550; *Wade v. State*, 71 Ind. 535; *Hinshaw v. State*, 147 Ind. 334, 47 N. E. 157; see also, *Bressler v. People*, 117 Ill. 422, 8 N. E. 62; *Horn v. State*, (Wyo.) 73 Pac. 705, 724.

⁴³ *State v. Cohen*, 108 Iowa 208, 78 N. W. 857, 75 Am. St. 213, 215; see also, *Leonard v. Territory*, 2 Wash. Ter. 381, 7 Pac. 872; *Carlton v. People*, 150 Ill. 181, 37 N. E. 244, 41 Am. St. 346; *State v. Hayden*, 45 Iowa 17.

§ 2714. **Substance of the charge—Venue—Variance.**—In criminal as well as civil cases it is the rule that the substance of the charge or issue must be proved, and that if it is not proved, the variance will usually be fatal. Indeed, in some jurisdictions, the courts incline to require greater strictness of proof on the trial of a prosecution for crime than in a civil action.⁴⁴ But proof of the substance or essence of the crime in a manner which substantially conforms to the description in the indictment is usually sufficient. The names of the persons injured and of others whose existence is essential to the charge must, ordinarily, be proved as laid,⁴⁵ but if there is sufficient evidence of identification a mistake in spelling or the like, will not necessarily be fatal, at least where the names are *idem sonans*.⁴⁶ So, while time and place are not always material in such a sense that they must be proved precisely as alleged,⁴⁷ yet in some instances they are material and even essential ingredients of the crime and must be proved as alleged,⁴⁸ and in other instances, by the manner of pleading, matters of description or detail may be made essential to be proved.⁴⁹ It is also necessary, as a general rule, no matter whether the exact time and place are material or not, to prove that the crime was committed before the time of the indictment and within the jurisdiction of the court.⁵⁰ But the venue may be in-

⁴⁴ See, Vol. I, § 200; as to proving intent as alleged, see, *Rex v. Jenks*, 2 Leach C. C. 896, 2 East P. C. 514; *Rex v. Boyce*, 1 Moody C. C. 29.

⁴⁵ Vol. I, § 200; *Rex v. Jenks*, 2 East P. C. 514, 2 Leach C. C. 896; *Rex v. Walker*, 3 Campb. 264; *Rex v. Deeley*, 4 Car. & P. 579, 1 Moody C. C. 303; *Johnson v. State*, 111 Ala. 66, 20 So. 590; *People v. Armstrong*, 114 Cal. 570, 46 Pac. 611; *Sykes v. People*, 132 Ill. 32, 23 N. E. 391; *King v. State*, 44 Ind. 285.

⁴⁶ Vol. I, § 200; see also, *Rex v. Peace*, 3 B. & Ald. 579, 1 Lead. Cr. Cas. 226; *State v. Grant*, 22 Me. 171; *Williams v. United States*, 2 App. (D. C.) 335; *State v. Gordon*, 56 Kans. 64, 42 Pac. 346; *Smurr v. State*, 88 Ind. 504; *Weltzel v. State*, 28 Tex. App. 523, 13 S. W. 864.

⁴⁷ *Smith v. State*, 108 Ala. 1, 19

So. 306; *Johnson v. State*, 13 Ind. App. 299, 41 N. E. 550; *Commonwealth v. Harrington*, 3 Pick. (Mass.) 26; *Hans v. State*, 50 Neb. 150, 69 N. W. 838; *People v. Jackson*, 111 N. Y. 362, 19 N. E. 54; *Crass v. State*, 30 Tex. App. 480, 17 S. W. 1096; *United States v. Matthews*, 68 Fed. 880.

⁴⁸ *Commonwealth v. Purdy*, 146 Mass. 138, 15 N. E. 364; *State v. Libby*, 84 Me. 461, 24 Atl. 940.

⁴⁹ See, *Wiley v. State*, 74 Ga. 840; *State v. Buckles*, 26 Kans. 237; *State v. Jackson*, 30 Me. 29; *Sweat v. State*, 4 Tex. App. 617; *Coleman v. State*, 21 Tex. App. 520, 2 S. W. 859.

⁵⁰ *State v. Bain*, 43 Kans. 638, 23 Pac. 1070; *State v. Dorr*, 82 Me. 212, 19 Atl. 171; *Arcia v. State*, 28 Tex. App. 198, 12 S. W. 599; see further

ferred from circumstantial evidence⁵¹ as well as proved by direct evidence. The strictness of the old rule as to variance between the proof and the indictment has been much relaxed in modern times, and it is said that variances are regarded as material because they may mislead the prisoner and because they may expose him to the danger of being again put in jeopardy for the same offense, and if they are not of a nature or extent to have any such effect they should not be regarded as fatal.⁵² "The general rule is that all averments necessary to constitute the substantive offense must be proved. If there is any exception, it is from necessity, or great difficulty amounting to such necessity, as where one could not show the negative and where the other with perfect ease can show the affirmative."⁵³ But mere surplusage which might have been omitted without affecting the indictment and which is not in any way essential to mark or distinguish the crime need not, as a rule, be proved as alleged.⁵⁴ And it is held that "where an offense may be committed by doing one of several things, the indictment may, in a single count, group them together, and charge the defendant with having committed them all, and a conviction may be had on proof of the commission of any one of these things without proof of the commission of the others."⁵⁵

as to proving venue, *Luck v. State*, 96 Ind. 16; *Harlan v. State*, 134 Ind. 339, 33 N. E. 1102; *Berry v. State*, 92 Ga. 47, 17 S. E. 1006; *Leslie v. State*, 35 Fla. 184, 17 So. 559; *State v. Farley*, 87 Iowa 22, 53 N. W. 1089; *People v. Curley*, 99 Mich. 238, 58 N. W. 68; *Ryan v. State*, 22 Tex. App. 699, 3 S. W. 547; *State v. Hobbs*, 37 W. Va. 812, 17 S. E. 380.

⁵¹ *McCune v. State*, 42 Fla. 192, 27 So. 867, 89 Am. St. 227; *Johnson v. State*, 35 Ala. 370; *State v. Morgan*, 35 La. Ann. 293; *Tinney v. State*, 111 Ala. 74, 20 So. 597; *Bloom v. State*, 68 Ark. 336, 58 S. W. 41; *People v. Kamaunu*, 110 Cal. 609, 42 Pac. 1090; *Thornell v. People*, 11 Colo. 305, 17 Pac. 904; *Commonwealth v. Costley*, 118 Mass. 1, 9, 26; *Bland v. People*, 4 Ill. 364; *State v. Snyder*, 44 Mo. App. 429, 430; *State v. McGinniss*, 74 Mo. 245, 246; *Beavers v. State*, 58 Ind. 530, 537; *Hoff-*

man v. State, 12 Tex. App. 406, 407; *Dumas v. State*, 62 Ga. 58, 65; *Weinecke v. State*, 34 Neb. 14, 51 N. W. 307; *Robson v. State*, 83 Ga. 166, 9 S. E. 610; *State v. Small*, 26 Kans. 209; *Brooke v. People*, 23 Colo. 375, 48 Pac. 502. It has also been held that it need not be proved beyond a reasonable doubt. *Wilson v. State*, 62 Ark. 497, 36 S. W. 842, 54 Am. St. 303; *State v. Burns*, 48 Mo. 438, 440; *Boggs v. State*, (Tex.) 25 S. W. 770; *State v. Benson*, 22 Kans. 471; *Warrace v. State*, 27 Fla. 362, 8 So. 748; *Hoffman v. State*, 12 Tex. App. 406, 407; *Achterberg v. State*, 8 Tex. App. 463.

⁵² *Harris v. People*, 64 N. Y. 148, 154.

⁵³ *Commonwealth v. Thurlow*, 24 Pick. (Mass.) 374, 381.

⁵⁴ See, *Commonwealth v. Rowell*, 146 Mass. 128, 15 N. E. 154.

⁵⁵ *Bork v. People*, 91 N. Y. 5, 13;

§ 2715. **Identity.**—After the *corpus delicti* is proved the next thing, ordinarily, is to connect the accused with the crime, and for this purpose direct evidence of his identity as the perpetrator of the crime is, of course, admissible, and it is held that the identifying witness need not be positive, but may speak according to his best impression and belief.⁵⁶ The evidence may be either direct or circumstantial and is often permitted to take a wide range, both upon examination in chief and cross-examination.⁵⁷ A witness may identify the accused by his voice, without seeing him,⁵⁸ at least where the voice is peculiar, although such evidence is not always regarded as very satisfactory.⁵⁹ So, evidence of footprints at the scene of the crime and a comparison of them with those of the accused is relevant and admissible in a proper case for the same purpose;⁶⁰ and weapons, burglarious tools, clothing, and the like, belonging to the accused or found in his possession at or near the scene of the crime may usually

see also, *Harris v. People*, 64 N. Y. 148, 153; *Reg. v. Rhodes*, 2 Ld. Raym. 886; *Roscoe Cr. Ev.* (6th Am. ed.) 763; 3 *Russell Crimes* (4th ed.) 105; 3 *Starkie Ev.* 860.

⁵⁶ *People v. Young*, 102 Cal. 411, 36 Pac. 770; *People v. Rolfe*, 61 Cal. 540; *People v. Stanley*, 101 Mich. 93, 59 N. W. 498; *State v. Cushenberry*, 157 Mo. 168, 56 S. W. 737; *People v. Burt*, 170 N. Y. 560, 62 N. E. 1099; *State v. Lytle*, 117 N. Car. 799, 23 S. E. 476; for many interesting instances of mistaken identity, see, *Ram Facts*, 462; *Harris Before Tr.* (Am. ed.) 372; *Sergeant Ballantine Experiences*, Chap. XLI, XLII; *Legal Puzzles*, 183; 1 *South. Law J.* 392; *Burrill Circ. Ev.* 631-651.

⁵⁷ See, *Yarbough v. State*, 105 Ala. 43, 16 So. 758; *State v. Stebbins*, 29 Conn. 463, 79 Am. Dec. 223; *State v. Bartlett*, 55 Me. 200; *Commonwealth v. Campbell*, 155 Mass. 537, 30 N. E. 72; *People v. Carey*, 125 Mich. 535, 84 N. W. 1087; *Davis v. State*, 51 Neb. 301, 70 N. W. 984; *State v. McDaniel*, 39 Ore. 161, 65

Pac. 520; *State v. Martin*, 47 S. Car. 67, 25 S. E. 113; *Olive v. State*, 11 Neb. 1, 7 N. W. 444 (cross-examination); *Mixon v. State*, 55 Miss. 525.

⁵⁸ *Fussell v. State*, 93 Ga. 450, 21 S. E. 97; *State v. Kepper*, 65 Iowa 745, 23 N. W. 304; *Commonwealth v. Hayes*, 138 Mass. 185; *Commonwealth v. Williams*, 105 Mass. 62; *People v. Willett*, 92 N. Y. 29; *Brown v. Commonwealth*, 76 Pa. St. 319; *Davis v. State*, 15 Tex. App. 594; *Givens v. State*, 35 Tex. Cr. App. 563, 34 S. W. 626; *Rex v. Harrison*, 12 St. Tr. 850.

⁵⁹ See, 1 *Elliott Gen. Pr.*, § 38.

⁶⁰ *Morris v. State*, 124 Ala. 44, 27 So. 336; *People v. Rowell*, 133 Cal. 39, 65 Pac. 127; *People v. Keep*, 123 Mich. 231, 81 N. W. 1097; *State v. Reed*, 89 Mo. 168, 1 S. W. 225; *Gray v. State*, 42 Fla. 174, 28 So. 53; *Commonwealth v. Pope*, 103 Mass. 440; *State v. Morris*, 84 N. Car. 756; *State v. Reitz*, 83 N. Car. 634; *Lipes v. State*, 15 Lea (Tenn.) 125, 54 Am. R. 402; *Goldsmith v. State*, 32 Tex. Cr. App. 112, 22 S. W. 405.

be shown.⁶¹ The use of evidence of tracking by bloodhounds,⁶² and the subject of physical inspection⁶³ have already been considered, and so has the use of photographs.

§ 2716. **Criminal intent.**—It has been said that a cardinal doctrine of criminal law, founded in natural justice, is that it is the intention with which an act was done that constitutes its criminality. The intent and the act must both concur, to constitute the crime.⁶⁴ But it is not always true that there must be any specific intent, other, at least, than the intent to do the act which the law forbids and denounces as a crime, even though the accused did not know that it was a crime.⁶⁵ “The proof,” it has been said, “may be either by evidence, direct or indirect, tending to establish the fact; or by inference of law from other facts proved.” While it is a maxim of law that every person is to be presumed innocent until he is proved to be guilty; yet it is also said that every sane person must be supposed to intend that which is the ordinary and natural consequence of his own voluntary act, and when he voluntarily does an act which the law denounces as a crime and the intention to do the act is the only criminal intent required, he will not be heard to say that he had no criminal intent. It follows that, as a general rule, “where an act, in itself indifferent, becomes criminal if done with a particular intent, there the intent must be proved and found; but where the act is in itself unlawful, the law usually implies a criminal intent.”⁶⁶

⁶¹ *Commonwealth v. Hagan*, 170 Mass. 571, 49 N. E. 922; *State v. Campbell*, 7 N. Dak. 58, 72 N. W. 935; *Siberry v. State*, 133 Ind. 677, 33 N. E. 681; and see, sections on, “Conduct indicating consciousness of guilt,” and “Recent possession of stolen property.”

⁶² See, Vol. II, § 1253.

⁶³ See, Vol. II, §§ 1014, 1232.

⁶⁴ 3 *Greenleaf Ev.*, § 13, citing, *Mackmurdo v. Smith*, 7 Term R. 514, per *Ld. Kenyon*; see also, *People v. Flack*, 125 N. Y. 324, 26 N. E. 267; *State v. Nuttles*, 7 Ohio Dec. 686; *State v. King*, 86 N. Car. 603; *Smith, Ex parte*, 135 Mo. 223, 36 S. W. 628, 58 Am. St. 576; 20 Am. St. 741, note.

⁶⁵ See, *State v. Heldenbrand*, 62

Neb. 136, 87 N. W. 25, 89 Am. St. 743; *Commonwealth v. Murphy*, 165 Mass. 66, 42 N. E. 504, 52 Am. St. 496; *Haggerty v. St. Louis &c. Co.*, 143 Mo. 238, 44 S. W. 1114, 65 Am. St. 647; *State v. Zichfeld*, 23 Nev. 304, 46 Pac. 802, 62 Am. St. 800.

⁶⁶ *Rex v. Woodfall*, 5 Burr. 2667; *State v. Levelle*, 34 S. Car. 120, 27 Am. St. 799; *State v. Huff*, 89 Me. 521, 36 Atl. 1000; *Commonwealth v. York*, 9 Metc. (Mass.) 93; *State v. Zichfeld*, 23 Nev. 304, 46 Pac. 802, 62 Am. St. 800; *Commonwealth v. Murphy*, 165 Mass. 66, 42 N. E. 504, 52 Am. St. 496; *State v. Southern R. Co.*, 122 N. Car. 1052, 30 S. E. 133; *State v. King*, 86 N. Car. 603; see, Vol. I, § 97.

§ 2717. **Criminal intent—Direct evidence.**—As already stated, the criminal intent may be shown by direct as well as indirect evidence, although it is often impossible to do so because direct evidence cannot be obtained. In a recent case it is said: “Whenever the motive, belief, or intention of the person is a material fact to be proved under the issue, it is competent to prove that such motive, belief or intention was by the direct testimony of such person, whether he happens to be a party to the action or not.”⁶⁷ Under or in accordance with this rule it is held in many jurisdictions that the defendant may himself testify as to his intent,⁶⁸ and that it is a question of fact for the jury,⁶⁹ except where the law conclusively presumes a certain intent from the doing of a certain act.⁷⁰

§ 2718. **Criminal intent—Circumstantial and presumptive evidence.**—It is often impossible to know the real intent of a person except by its outward or visible manifestations through his conduct or acts, and these, so far as relevant, may usually be shown for that purpose, the presumption or inference ordinarily being that the natural consequences were intended. This, it has been said, “is founded upon experience gained by a study of human nature, whereby it is found that all men are largely influenced by the same motives, and that

⁶⁷ *Olson v. United States*, 133 Fed. 849, 856, citing, *Berkey v. Judd*, 22 Minn. 287; *Garrett v. Mannheim*, 24 Minn. 193; *Gardom v. Woodward*, 44 Kans. 758, 25 Pac. 199, 21 Am. St. 310; *Frost v. Rosecrans*, 66 Iowa 405, 23 N. W. 895.

⁶⁸ *Kerrains v. People*, 60 N. Y. 221; *People v. Baker*, 96 N. Y. 340; *Ross v. State*, 116 Ind. 495, 19 N. E. 451; *Hamilton v. State*, 22 Ind. App. 479, 486, 52 N. E. 419; *Greer v. State*, 53 Ind. 420; *White v. State*, 53 Ind. 595; *Smith v. State*, 13 Tex. App. 507; *People v. Farrell*, 31 Cal. 576; *People v. Quick*, 51 Mich. 547, 18 N. W. 375; *State v. Montgomery*, 65 Iowa 483, 22 N. W. 639; *State v. King*, 86 N. Car. 603; “Evidence of Intent,” 22 Cent. L. J. 271.

⁶⁹ *People v. Flack*, 125 N. Y. 334, 26 N. E. 267, 11 L. R. A. 307; *McKenna v. People*, 81 N. Y. 360; *Peo-*

ple v. Winters, 93 Cal. 277, 28 Pac. 946; *People v. Griffin*, 77 Mich. 585, 43 N. W. 1061; *Burke v. State*, 71 Ala. 377; *Carter v. State*, 22 Fla. 553; *Russell v. State*, 68 Ga. 785; *State v. Swayze*, 30 La. Ann. 1325; *Buckner v. Commonwealth*, 14 Bush (Ky.) 603; see also, *Berry v. State*, 31 Ohio St. 219.

⁷⁰ See, 1 Bishop Cr. Law 314; *Ridenour v. State*, 38 Ohio St. 272; *Shover v. State*, 10 Ark. 259; *Achey v. State*, 64 Ind. 56, 59; *Flinn v. State* 24 Ind. 286; *Commonwealth v. York*, 9 Metc. (Mass.) 93, 43 Am. Dec. 373; *Commonwealth v. Webster*, 5 Cush. (Mass.) 295; *State v. Smith*, 93 N. Car. 516; *State v. Lautenschlager*, 22 Minn. 514; *People v. Petheram*, 64 Mich. 252, 31 N. W. 188; *Reynolds v. United States*, 98 U. S. 145.

certain acts indicate certain intentions. Therefore, proof of such acts is circumstantially, at least, proof of the intention which usually accompanies them. The inference to be drawn from the acts and circumstances is usually one of fact for the jury to determine; but there are some instances where, as experience has shown, there can be but one reasonable inference, which of necessity arises from the facts as they stand otherwise unexplained."⁷¹ But, in most cases the intention is not so clearly or conclusively shown that the law itself can draw the inference, and it is then necessary to prove acts and circumstances from which the court or jury may draw the inference as a fact. As said in one case, "intention is an inferential fact to be drawn by the jury from proven attendant facts and circumstances."⁷² "The force of the inference," says Starkie, "results from the consideration that the intention of a rational agent corresponds with the means which he employs, and that he intends that consequence to which his conduct naturally and immediately tends."⁷³ It may be stated generally that all the attendant and surrounding facts and circumstances tending directly or indirectly to throw light on the intention, may usually be given in evidence, unless excluded by some other rule of evidence applicable to the particular case. "So, in criminal prosecutions, evidence of other acts contemporaneous with the principal transaction may often be admitted to show criminal intent."⁷⁴ And it has been held that the manner of one accused of passing counterfeit money, at the time of passing it, may be shown, as tending to prove guilty knowledge and intent."⁷⁵ So, too, other acts of a similar character, or done by the accused with a similar intent, although committed before or after the doing of the principal act, may often be given in evidence,⁷⁶ even though the evidence of such other facts offered to prove intent, at the same time proves the commission of

⁷¹ 22 Cent. L. J. 272.

⁷² *Burke v. State*, 71 Ala. 377, 5 Cr. L. Mag. 912; see also, *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 3 Am. St. 320, 398.

⁷³ 2 Starkie Ev. *739.

⁷⁴ *Rex v. Long*, 6 Car. & P. 179; *White v. State*, 11 Tex. 769, 773; *Dibble v. People*, 4 Park. Cr. Cas. (N. Y.) 199; *People v. Lopez*, 59 Cal. 362; *Commonwealth v. Stone*, 4 Metc. (Mass.) 43; 3 Greenleaf Ev., § 19.

⁷⁵ *Butler v. State*, 22 Ala. 43; *State v. Middleham*, 62 Iowa 150, 17 N. W. 446, 18 Cent. L. J. 56.

⁷⁶ *Goersen v. State*, 99 Pa. St. 388; *Rex v. Ball*, 1 Campb. 324; *Rex v. Smith*, 4 Car. & P. 411; *State v. Mix*, 15 Mo. 153; *Williams v. State*, 8 Humph. (Tenn.) 585; *Commonwealth v. McCarthy*, 119 Mass. 254; *United States v. Russell*, 19 Fed. 591, 18 Cent. L. J. 318; *Porter v. Stone*, 62 Iowa 442, 17 N. W. 654.

another crime.” The general rule, however, as will hereafter be shown, is that evidence of entirely distinct and independent crimes is incompetent and inadmissible to show that the accused committed the crime in question.

§ 2719. **Motive.**—The terms “motive” and “intention” are sometimes used without distinction, but motive generally precedes intention and is that which causes or induces the act, and there may be an intention without any motive, at least so far as can be ascertained, so that it is not always necessary to show a motive for the alleged crime,⁷⁸ but it is usually relevant, and the presence or absence of a motive is sometimes controlling.⁷⁹ Thus, in a recent case it is said: “In the investigation of all charges of crime it is competent to prove a motive on the part of the accused for the commission of the criminal act. Motive is an inducement, or that which leads or tempts the mind to indulge the criminal act. It is resorted to as a means of arriving at an ultimate fact, not for the purpose of explaining the reason of a criminal act, which has been clearly proved, but for the important aid it may render in completing the proof of the commission of the act when it might otherwise remain in doubt. With motives, in any speculative sense, neither the law nor the tribunal which administers it has any concern. It is in cases of proof by circumstantial evidence that the motive often becomes not only ma-

⁷⁸ *Moore v. United States*, 150 U. S. 57, 14 Sup. Ct. 26; *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54; *Shriedley v. State*, 23 Ohio St. 130; *Bersh v. State*, 13 Ind. 434; *Reg. v. Dossett*, 2 Car. & Kir. 306; *Commonwealth v. Bradford*, 126 Mass. 42; *State v. Riggs*, 39 Conn. 498; *Roscoe Cr. Ev.* *95; 1 *Bishop Cr. Pro.*, § 493; but compare, *State v. Goetz*, 34 Mo. 85; *State v. Harrold*, 38 Mo. 496.

⁷⁹ See, *People v. Lane*, 100 Cal. 379, 34 Pac. 856; *Commonwealth v. Jeffries*, 7 Allen (Mass.) 548; *Goodwin v. State*, 96 Ind. 550; *Reynolds v. State*, 147 Ind. 3, 46 N. E. 31; *Hinshaw v. State*, 147 Ind. 334, 47 N. E. 157. “The motives to the commission of the crime,” says Burrill, “may be reduced under two princi-

pal heads:—The desire of unlawful gain, and the gratification of unlawful passion.” *Burrill Circ. Ev.* 285.

⁸⁰ *People v. Fitzgerald*, 156 N. Y. 253, 258, 50 N. E. 846; *Kennedy v. People*, 39 N. Y. 245; *Jones v. State*, 64 Ind. 473; *Davidson v. State*, 135 Ind. 254, 34 N. E. 972; *Bonner v. State*, 107 Ala. 97, 18 So. 226; *Bulloch v. State*, 10 Ga. 47, 54 Am. Dec. 369; *Hunter v. State*, 43 Ga. 483; *People v. Wolf*, 95 Mich. 625, 55 N. W. 357; *State v. Donnelly*, 130 Mo. 642, 32 S. W. 1124; *Commonwealth v. Ferrigan*, 44 Pa. St. 386; *Webb v. State*, 73 Miss. 456, 19 So. 238; *State v. Burton*, 63 Kans. 602, 66 Pac. 633; Vol. I, § 163, and other authorities there cited.

terial but controlling, and in such cases the facts from which it may be inferred must be proved. It cannot be imagined any more than any other circumstance in the case."⁸⁰ But even where circumstantial evidence alone is relied on it is not always essential that a motive for the crime be established nor that the evidence should show it was impossible for any one else to have committed the crime;⁸¹ and the motive itself may be established by circumstantial evidence.⁸² So, on the other hand, motive, it has been said, is only a circumstance which is never of itself sufficient to establish defendant's guilt, and the defendant has a right, if he can, to explain the act which is offered as evidence of a wicked motive,⁸³ and the jury may, if they choose, accept his explanation. So, evidence showing that there was no apparent motive, or, in some cases, that there was no such intent as that alleged, is admissible in his favor in a proper case.⁸⁴

§ 2720. Evidence of other crimes.—As a general rule, evidence is not admissible to show that the accused has committed a crime wholly distinct from and independent of that for which he is on trial.⁸⁵

⁸⁰ *People v. Fitzgerald*, 156 N. Y. 253, 50 N. E. 846; *People v. Bennett*, 49 N. Y. 137; *People v. Owens*, 148 N. Y. 648, 43 N. E. 71.

⁸¹ *Sumner v. State*, 5 Blackf. (Ind.) 579, 36 Am. Dec. 561; *Hinshaw v. State*, 147 Ind. 334, 47 N. E. 157.

⁸² *People v. Wood*, 3 Park. Cr. Cas. (N. Y.) 681; see also, *Stitz v. State*, 104 Ind. 359, 4 N. E. 145; *Hinshaw v. State*, 147 Ind. 334, 47 N. E. 157; *Morris v. State*, 30 Tex. App. 95, 16 S. W. 757; *Chalk v. State*, 35 Tex. Cr. App. 116, 32 S. W. 534; *Marable v. State*, 89 Ga. 425, 15 S. E. 453.

⁸³ *Stitz v. State*, 104 Ind. 359, 4 N. E. 145; see also, *State v. Meche*, 42 La. Ann. 273, 7 So. 573.

⁸⁴ *Robinson v. State*, 53 Md. 151, 36 Am. R. 399; *State v. Meche*, 42 La. Ann. 273, 7 So. 573; *Schwabacher v. People*, 165 Ill. 618, 46 N. E. 809; that he may testify to it as a fact, see also, *Fenwick v. State*, 63

Md. 239; *Commonwealth v. Woodward*, 102 Mass. 155; *Cummings v. State*, 50 Neb. 274, 69 N. W. 756; also see, Vol. I, § 163.

⁸⁵ *Bullock v. State*, 65 N. J. L. 557, 47 Atl. 62, 86 Am. St. 568; *People v. Corbin*, 56 N. Y. 363; *People v. Sharp*, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. 851; *Coleman v. People*, 55 N. Y. 81; *State v. Shuford*, 69 N. Car. 486, 493; *State v. Jeffries*, 117 N. Car. 727, 23 S. E. 163; *State v. Murphy*, 84 N. Car. 742; *Snyder v. Commonwealth*, 85 Pa. St. 519, 521; *Mason v. State*, 42 Ala. 532, 537; *Coble v. State*, 31 Ohio St. 100, 102; *State v. Boyland*, 24 Kans. 186, 187; *Clapp v. State*, 94 Tenn. 186, 202, 203, 30 S. W. 214; *People v. Fowler*, 104 Mich. 449, 62 N. W. 572; *People v. Baird*, 104 Cal. 462, 464, 38 Pac. 310; *People v. Bowen*, 49 Cal. 654; *State v. Moberly*, 121 Mo. 604, 26 S. W. 364; *Farris v. People*, 129 Ill. 521, 21 N. E. 821, 16 Am. St. 283; *Painter v. People*, 147 Ill. 444,

But there are cases in which evidence of other like offenses committed by the defendant is relevant and admissible. If several crimes are so intermingled, blended or connected, that they form an indivisible criminal transaction and a complete account of the transaction for which the accused is being tried cannot be given, without showing the others, any or all of them may usually be shown, at least where the offense for which he is being tried is, itself, a detail of the whole criminal scheme.⁸⁶ Generally speaking, it may be said that evi-

447, 463, 35 N. E. 64; *Garrison v. People*, 87 Ill. 96; *State v. Burk*, 88 Iowa 661, 667, 56 N. W. 180; *State v. Crawford*, 39 S. Car. 343; *Cotton v. State*, (Miss.) 17 So. 372; *State v. Bates*, 46 La. Ann. 849, 851, 15 So. 204; *Commonwealth v. Jackson*, 132 Mass. 16-21; *Holder v. State*, 58 Ark. 473, 25 S. W. 279; *State v. La Page*, 57 N. H. 245; *Stone v. State*, 4 Humph. (Tenn.) 27; *People v. Stout*, 4 Park. Cr. Cas. (N. Y.) 71, 127; *People v. Dowling*, 84 N. Y. 478; *State v. Kelley*, 65 Vt. 531, 27 Atl. 203; *Turner v. State*, 102 Ind. 425, 427, 1 N. E. 869; *People v. Thacker*, 108 Mich. 652, 66 N. W. 562; *State v. Reynolds*, (Kans.) 47 Pac. 573; *Ware v. State*, 36 Tex. Cr. App. 597, 38 S. W. 198; *Tyrrell v. State*, (Tex.) 38 S. W. 1011; *Rhea v. State*, 37 Tex. Cr. App. 138, 38 S. W. 1012; see also, *State v. Crofford*, 121 Iowa 395, 96 N. W. 889; *State v. Berger*, 121 Iowa 581, 96 N. W. 1094; *State v. Williams*, 111 La. Ann. 179, 35 So. 505; *State v. Hendrick*, (N. J.) 56 Atl. 247; in, *Shears v. State*, 147 Ind. 51, 46 N. E. 331, it is said: "Wherever the intent with which an alleged offense was committed is equivocal, and such intent becomes an issue at the trial, proof of other similar offenses, within certain reasonable limits, is admissible as tending to throw light upon the intentions of the accused in doing the act complained

of; but where, from the nature of the offense under investigation, proof of its commission as charged, as in the case before us, carries with it the evident implication of a criminal intent, evidence of the perpetration of other like offenses, ought not to be admitted." But see; *State v. Jones*, 171 Mo. 401, 71 S. W. 680, 94 Am. St. 786; many authorities are reviewed in the note in 62 L. R. A. 193; but admissions made by the accused before a crime, as to the commission of other independent crimes, to induce a third person to take part in the crime have been held competent; *State v. Hayward*, 62 Minn. 474, 65 N. W. 63; *McSwean v. State*, 113 Ala. 661, 21 So. 211.

⁸⁶ *Rex v. Ellis*, 6 B. & Cr. 139, 145; *Reg. v. Roden*, 10 Moak 511; *Commonwealth v. Call*, 21 Pick. (Mass.) 515, 522; *Commonwealth v. Sturdivant*, 117 Mass. 122, 132; *Commonwealth v. Corkin*, 136 Mass. 429; *State v. Valwell*, 66 Vt. 558, 562, 29 Atl. 1018; *People v. Bidleman*, 104 Cal. 608, 38 Pac. 502; *People v. Dailley*, 143 N. Y. 638, 73 Hun (N. Y.) 16, 37 N. E. 823, 25 N. Y. S. 1050; *Mixon v. State*, (Tex.) 31 S. W. 403; *Turner v. State*, 102 Ind. 425, 427, 1 N. E. 869; *Frazier v. State*, 135 Ind. 38, 41, 34 N. E. 817; *Bottomley v. United States*, 1 Story (U. S.) 135; *State v. Folwell*, 14 Kans. 105; *Walters v. People*, 6 Park. Cr. Cas. (N.

dence of other crimes is admissible for the purpose of showing—when it fairly tends to do so—motive, intent, the absence of mistake or accident, common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others, or the identity of the person charged with the commission of the crime on trial.⁸⁷ But the particulars of a collateral crime should not ordinarily be gone into further than they are relevant to the purpose for which the evidence is competent.⁸⁸

§ 2721. Character of accused.—The subject of character evidence in its general aspect was fully considered in another volume.⁸⁹ For that reason and for the further reason that character evidence in particular cases will be considered in treating of specific crimes, it is unnecessary to go into the subject very fully in this place. It is a general rule that the accused may introduce evidence of his good character at least so far as it relates to traits of character relevant to the issue,⁹⁰ but even in the absence of any evidence on the subject

Y.) 15, 22; *Reese v. State*, 7 Ga. 373; *People v. Haver*, 4 N. Y. Cr. 171; *Phillips v. People*, 57 Barb. (N. Y.) 353, 42 N. Y. 200; *State v. Desroches*, 48 La. Ann. 428, 19 So. 250; *State v. Williamson*, 106 Mo. 162, 170, 17 S. W. 172; *Hickam v. People*, 137 Ill. 75, 27 N. E. 88, 89; *State v. Testerman*, 68 Mo. 408, 415; *State v. Perry*, 136 Mo. 126, 37 S. W. 804; *Killins v. State*, 28 Fla. 313, 334, 9 So. 711; *State v. Gainor*, 84 Iowa 209, 50 N. W. 947; *Pitner v. State*, 37 Tex. Cr. App. 268, 39 S. W. 662; *People v. Foley*, 64 Mich. 148, 157, 31 N. W. 94; *Heath v. Commonwealth*, 1 Rob. (Va.) 735, 743; *Brown v. Commonwealth*, 76 Pa. St. 319, 337; *Commonwealth v. Robinson*, 146 Mass. 571, 578, 16 N. E. 452; *Crews v. State*, 34 Tex. Cr. App. 533, 31 S. W. 373; *Morris v. State*, 30 Tex. App. 95, 16 S. W. 757; *Dawson v. State*, 32 Tex. Cr. App. 535, 25 S. W. 21, 40 Am. St. 791; see also, *Commonwealth v. Major*, 198 Pa. St. 290, 47 Atl. 741, 82 Am. St.

803; *Glover v. People*, 204 Ill. 170, 68 N. E. 464.

⁸⁷ *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, and elaborate note; *State v. Vance*, 119 Iowa 685, 94 N. W. 204; note in, 44 Am. R. 299–308; see also, *People v. Seaman*, 107 Mich. 348, 65 N. W. 203, 61 Am. St. 326, and numerous authorities cited and reviewed; note in, 42 Am. St. 333, and 48 Am. St. 961; *Knights v. State*, 58 Neb. 225, 78 N. W. 508, 76 Am. St. 78; *Shriedley v. State*, 23 Ohio St. 130; *Bainbridge v. State*, 30 Ohio St. 264; *Lindsey v. State*, 38 Ohio St. 507.

⁸⁸ Vol. I, § 175, note 216.

⁸⁹ See, Vol. I, §§ 167–171.

⁹⁰ *State v. Hice*, 117 N. Car. 782, 23 S. E. 357; *Hall v. State*, 132 Ind. 317, 31 N. E. 536; *Griffin v. State*, 14 Ohio St. 55; *State v. Schleagel*, 50 Kans. 325, 31 Pac. 1105; *People v. Ashe*, 44 Cal. 288; *State v. Donahoo*, 22 W. Va. 761; *Stover v. People*, 56 N. Y. 315; *Cancemi v. People*, 16 N. Y. 506, and numerous authori-

there is no presumption that his character is bad and no unfavorable presumption is indulged from his failure to offer evidence of good character, nor can it be commented on, in most jurisdictions, by the prosecutor.⁹¹ The prosecution cannot give evidence of his bad character unless he has introduced evidence of good character,⁹² except where he is a witness, in which case such evidence is admissible to impeach him, as in the case of other witnesses.⁹³ It is now well settled in most jurisdictions, contrary to some of the older decisions, that evidence of good character is admissible and entitled to consideration on the question of guilt along with the other evidence, not only in doubtful cases, or cases in which the other evidence is of itself contradictory or unconvincing, but also in all proper cases, no matter whether the other evidence in and of itself is apparently conclusive or inconclusive.⁹⁴

ties cited in last note to this section.

⁹¹ *Ormsby v. People*, 53 N. Y. 472; *Ackley v. People*, 9 Barb. (N. Y.) 609; *State v. Dockstader*, 42 Iowa 436; *State v. Upham*, 38 Me. 261; *State v. O'Neal*, 7 Ired. L. (N. Car.) 251; see also, Vol. I, § 227; *People v. Gleason*, 122 Cal. 370, 55 Pac. 123; *Olive v. State*, 11 Neb. 1, 7 N. W. 444; but see, *State v. Kabrich*, 39 Iowa 277; *State v. McAllister*, 24 Me. 139.

⁹² *People v. Shea*, 147 N. Y. 78, 41 N. E. 508; *People v. White*, 24 Wend. (N. Y.) 524; *Rex v. Rowton*, Leigh & C. 520; *Felsenthal v. State*, 30 Tex. App. 675, 18 S. W. 644; *State v. Ellwood*, 17 R. I. 763, 24 Atl. 782; *State v. Creson*, 38 Mo. 372; *Carter v. State*, 36 Neb. 481, 54 N. W. 853; *State v. Thurtell*, 29 Kans. 148; *Maxwell v. State*, (Tex. Cr. App.) 78 S. W. 516; *Fletcher v. State*, 49 Ind. 124; *Drew v. State*, 124 Ind. 9, 23 N. E. 1098; *Underhill Cr. Ev.*, § 78; *Wharton Cr. Ev.*, § 64, et seq.

⁹³ Vol. II, §§ 972, 978, 981-988; *McDonald v. Commonwealth*, 86 Ky. 10, 4 S. W. 687; *People v. McKane*, 143

N. Y. 455, 38 N. E. 950; *Cluck v. State*, 40 Ind. 263; *Felsenthal v. State*, 30 Tex. App. 675, 18 S. W. 644; *Commonwealth v. Hardy*, 2 Mass. 303. Or where character is in issue under the substantive law. Vol. I, § 168, and especially note 143.

⁹⁴ *Kee v. State*, 28 Ark. 155; *Scott v. State*, 105 Ala. 57, 16 So. 925, 53 Am. St. 100; *People v. Stewart*, 28 Cal. 395; *People v. Mead*, 50 Mich. 233, 15 N. W. 95; *People v. Van Dam*, 107 Mich. 425, 65 N. W. 277; *State v. Sloan*, 22 Mont. 283, 56 Pac. 364; *Edgington v. United States*, 164 U. S. 361, 17 Sup. Ct. 72; *Holland v. State*, 131 Ind. 568, 31 N. E. 359; *Kistler v. State*, 54 Ind. 400; *State v. Murphy*, 118 Mo. 7, 25 S. W. 95; *State v. Holmes*, 65 Minn. 230, 68 N. W. 11; *Harrington v. State*, 19 Ohio St. 264; *State v. Rodman*, 62 Iowa 456, 17 N. W. 663; *Hanney v. Commonwealth*, 116 Pa. St. 322, 9 Atl. 339; *State v. Lepere*, 66 Wis. 355, 28 N. W. 202; *Bacon v. State*, 22 Fla. 51; *Redd v. State*, 99 Ga. 210, 25 S. E. 268; *Commonwealth v. Leonard*, 140 Mass. 473, 4 N. E. 96; *Lee v. State*, 2 Tex.

§ 2722. Character of others.—In some instances the accused may not only introduce evidence of his own good character but also of the bad character in certain respects of the prosecuting witness or party upon whom the crime is charged to have been committed.⁹⁵ As a general rule, however, the character of the prosecutor or of others is not in issue and evidence thereof is ordinarily incompetent except where it is used to impeach a witness. So, evidence of the bad character of the associates of the accused, or of other third persons is, ordinarily, irrelevant and inadmissible.⁹⁶ But there are exceptional cases in which the character or bad reputation of third persons may be shown.⁹⁷ This subject, however, has already been sufficiently treated.⁹⁸

§ 2723. Conduct indicating consciousness of guilt.—It has been laid down as a general rule that evidence of circumstances, which are part of a person's behavior subsequent to an event which it is alleged or suspected he is connected with or implicated in, are relevant if the circumstances are such as would be natural and usual, assuming the connection or implication to exist. And sometimes, but not universally, evidence of actions and circumstances, inconsistent with such an assumption, is relevant as a basis for an inference that the person accused or suspected did not participate in the event. Under these rules evidence will be received to prove or dis-

App. 338; *State v. Pucca*, (Del.) 55 Atl. 831.

⁹⁵ See, Vol. I, § 170; also, *People v. Johnson*, 106 Cal. 289, 39 Pac. 622 (character of complainant in rape case); *State v. Johnson*, 28 Vt. 514 (same); *Rex v. Ryan*, 2 Cox Cr. Cas. 115; *Rex v. Clarke*, 2 Starkie 214; *Brown v. State*, 72 Miss. 95, 16 So. 202; *Commonwealth v. Harris*, 131 Mass. 336; *State v. Duffey*, 128 Mo. 549, 31 S. W. 98; *People v. McLean*, 71 Mich. 310, 38 N. W. 917; *Brown v. State*, 72 Md. 468, 20 Atl. 186; *Williams v. Fambro*, 30 Ga. 233 (quarrelsome character of deceased in homicide case); *Commonwealth v. Hoskins*, 18 Ky. L. R. 59, 35 S. W. 284 (same).

⁹⁶ See, *State v. Beaty*, 62 Kans. 266, 62 Pac. 658; *Walls v. State*, 125 Ind.

400, 25 N. E. 457; *State v. Staton*, 114 N. Car. 813, 19 S. E. 96; *Omer v. Commonwealth*, 95 Ky. 353, 25 S. W. 594; *State v. Rose*, 47 Minn. 47, 49 N. W. 404.

⁹⁷ See, *Commonwealth v. Gray*, 129 Mass. 474; *Commonwealth v. Gannett*, 1 Allen (Mass.) 7; *State v. Boardman*, 64 Me. 523; *Winslow v. State*, 5 Ind. App. 306, 317, 32 N. E. 98 (in dissenting opinion); *Sparks v. State*, 59 Ala. 82; *Clementine v. State*, 14 Mo. 112; *Johnson v. State*, 28 Tex. App. 562, 13 S. W. 1005; *State v. Toombs*, 79 Iowa 741, 45 N. W. 300; *State v. Hendricks*, 15 Mont. 194, 39 Pac. 93, 48 Am. St. 666.

⁹⁸ See, Vol. I, §§ 168, 169, 170, 171, 176.

prove facts or circumstances which indicate a consciousness of guilt on the part of the accused, existing after the crime with which he is charged was committed. His conduct and general demeanor, his language, oral or written, and his mental and physical attitude and relations toward the crime, or his actions in the presence of those who discovered it, or who are engaged in detecting its perpetrator, are relevant.⁹⁹ But, while such evidence is not required to relate to facts contemporaneous with the commission of the alleged crime, or strictly part of the *res gestae*, the time and circumstances must not be so remote as to furnish no fair inference of consciousness of guilt.¹⁰⁰ False testimony or information concerning himself or his whereabouts and actions about the time of the commission of the crime,¹⁰¹ and the fabrication or suppression of evidence,¹⁰² are examples of matters that may usually be shown under the general rule. So, evidence of nervousness, excitement and fear exhibited by the accused,¹⁰³ or of his conduct and demeanor in any respect tending to show consciousness of guilt,¹⁰⁴ is admissible within proper limits. And even silence under accusation of guilt under such circumstances that an innocent man would usually speak, may be shown in evi-

⁹⁹ Underhill Cr. Ev., § 115, citing, *McAdory v. State*, 62 Ala. 154; *People v. Stanley*, 47 Cal. 113; *People v. Welsh*, 63 Cal. 167; *State v. Hill*, 134 Mo. 663, 36 S. W. 223.

¹⁰⁰ *State v. Baldwin*, 36 Kans. 1, 12 Pac. 318.

¹⁰¹ *Hays v. State*, 40 Md. 633; *State v. Bishop*, 98 N. Car. 773, 4 S. E. 357; *State v. Broughton*, 7 Ired. L. (N. Car.) 96; *Lovett v. State*, 60 Ga. 257; *State v. Williams*, 66 Iowa 573, 24 N. W. 52; *State v. Bradley*, 64 Vt. 466, 24 Atl. 1053; *Cathcart v. Commonwealth*, 37 Pa. St. 108; *Hicks v. State*, 99 Ala. 169, 13 So. 375; *Hamilton v. State*, 62 Ark. 543, 36 S. W. 1054; see also, *Commonwealth v. Trefethen*, 157 Mass. 180, 31 N. E. 961; *Wilson v. United States*, 162 U. S. 613, 16 Sup. Ct. 895.

¹⁰² See, Vol. I, §§ 94, 226; see also,

People v. Marion, 29 Mich. 31; *Collins v. Commonwealth*, 12 Bush (Ky.) 271; *Conway v. State*, 118 Ind. 482, 21 N. E. 285; *Turner v. State*, 102 Ind. 425, 1 N. E. 869; *Keesler v. State*, 154 Ind. 242, 56 N. E. 232; *Williams v. State*, 22 Tex. App. 497, 4 S. W. 64.

¹⁰³ *Gilford v. State*, (Tex. Cr. App.) 78 S. W. 692; *Prince v. State*, 100 Ala. 144, 14 So. 409; *State v. Ward*, 61 Vt. 153, 17 Atl. 483; *Lindsey v. People*, 63 N. Y. 143; *State v. Baldwin*, 36 Kans. 1, 12 Pac. 318; *Williams v. State*, (Ark.) 16 S. W. 816.

¹⁰⁴ See, *People v. O'Neill*, 112 N. Y. 355, 19 N. E. 796; *Greenfield v. People*, 85 N. Y. 75; *Noftsinger v. State*, 7 Tex. App. 301; see also, *State v. De Berry*, 92 N. Car. 800; *State v. Soper*, 16 Me. 293.

dence.¹⁰⁵ But the accused may, of course, explain his silence by proper evidence.¹⁰⁶

§ 2724. Conduct indicating consciousness of guilt—Flight—Concealment.—Evidence that the accused fled or concealed himself to avoid arrest is admissible as a circumstance to be considered in determining his guilt or innocence.¹⁰⁷ So, also, is the fact that he resisted arrest¹⁰⁸ or attacked the officers with deadly weapons,¹⁰⁹ or attempted to escape after he was arrested, and was recaptured.¹¹⁰ But such acts are not, of course, conclusive evidence that defendant is guilty of the crime for which he is on trial,¹¹¹ and the defendant has a right to offer an explanation of his conduct,¹¹² as, for instance, that he fled to escape a mob which threatened his life,¹¹³ or that his friends advised him to leave,¹¹⁴ or the like.¹¹⁵ Indeed, the better

¹⁰⁵ Vol. I, §§ 221, 230; see also, *Commonwealth v. Brailey*, 134 Mass. 527; *State v. Suggs*, 89 N. Car. 527; *State v. Howard*, 102 Mo. 142, 14 S. W. 937; *Moore v. State*, 96 Tenn. 209, 33 S. W. 1046; *State v. Magoon*, 68 Vt. 289, 35 Atl. 310; *Joiner v. State*, 119 Ga. 315, 46 S. E. 412.

¹⁰⁶ *State v. Flanagan*, 25 Ark. 92; *Commonwealth v. Kenney*, 12 Metc. (Mass.) 235; *People v. Willett*, 92 N. Y. 29; *Kelley v. People*, 55 N. Y. 565; *Bell v. State*, 93 Ga. 557, 19 S. E. 244; *Slattey v. People*, 76 Ill. 217; *Loggins v. State*, 8 Tex. App. 434.

¹⁰⁷ *Allen v. United States*, 164 U. S. 492, 17 Sup. Ct. 154; *Waybright v. State*, 56 Ind. 122; *Batten v. State*, 80 Ind. 394; *State v. Moore*, 101 Mo. 316, 14 S. W. 182; *State v. Foster*, 136 Mo. 653, 38 S. W. 721; *Commonwealth v. Brigham*, 147 Mass. 414, 18 N. E. 167; *Commonwealth v. McMahon*, 145 Pa. St. 413, 22 Atl. 971; *Ryan v. State*, 83 Wis. 486, 53 N. W. 836; Vol. I, §§ 156, 165.

¹⁰⁸ *Shepherd v. State*, 64 Ind. 43; *Anderson v. State*, 147 Ind. 445, 46

N. E. 901; *State v. Taylor*, 118 Mo. 153, 24 S. W. 449. So, that he threatened to kill any one who attempted to arrest him, or would die before he would be taken. *Horn v. State*, 102 Ala. 144, 15 So. 278; *Ross v. State*, 74 Ala. 532.

¹⁰⁹ *Anderson v. State*, 147 Ind. 445, 46 N. E. 901.

¹¹⁰ *Hittner v. State*, 19 Ind. 48; *Anderson v. State*, 147 Ind. 445, 46 N. E. 901.

¹¹¹ *State v. Mallon*, 75 Mo. 355; *Waybright v. State*, 56 Ind. 122; *Hickory v. United States*, 160 U. S. 408, 16 Sup. Ct. 327.

¹¹² *Evans v. State*, (Tex. Cr. App.) 76 S. W. 467; *State v. Potter*, 108 Mo. 424, 22 S. W. 89; *State v. Barham*, 82 Mo. 67.

¹¹³ *Batten v. State*, 80 Ind. 394; *Evans v. State*, (Tex. Cr. App.) 76 S. W. 467; *State v. Brooks*, 92 Mo. 542, 5 S. W. 257.

¹¹⁴ *State v. Moncla*, 39 La. Ann. 868, 2 So. 814; *Waybright v. State*, 56 Ind. 122; *Walters v. State*, 17 Tex. App. 226.

¹¹⁵ See, *State v. Phillips*, 24 Mo. 475; *State v. Baker*, (Mo.) 19 S.

rule is that mere flight or the like, does not of itself, apart from the motive, necessarily raise any presumption of guilt, but the motive may be inferred from circumstances, and flight to avoid arrest or imprisonment is a circumstance to be considered by the jury along with the reason that prompted it and together with the other evidence in the case and may lead to the inference of guilt.¹¹⁶ And evidence tending to show that subsequent to the commission of the offense the defendant evinced a desire to conceal the crime or shield the criminal has been held incompetent in the absence of any affirmative evidence tending to show that the defendant participated in the offense.¹¹⁷ But, in general, evidence of a disposition to conceal the crime and stop public inquiry is admissible.¹¹⁸ On the other hand, the fact that the defendant did not flee,¹¹⁹ or that he voluntarily surrendered himself,¹²⁰ is usually inadmissible and cannot be considered as showing innocence. So, it is inadmissible for him to show for that purpose that, after being put in jail, he had an opportunity to escape and declined to do so.¹²¹

§ 2725. Conduct indicating consciousness of guilt—Recent possession of stolen property.—There is some conflict among the authorities upon the subject of the admissibility and effect of evidence of the possession of stolen goods.¹²² The true rule, however, is that evidence of the recent unexplained possession of stolen goods by the accused is admissible and may justify the inference of guilt;¹²³ but

W. 222; *Lewallen v. State*, 33 Tex. Cr. App. 412, 26 S. W. 832; *Elmore v. State*, 98 Ala. 12, 13 So. 427.

¹¹⁶ *Ryan v. People*, 79 N. Y. 593, 19 Hun (N. Y.) 188; *Hickory v. United States*, 160 U. S. 408, 16 Sup. Ct. 327; *Alberty v. United States*, 162 U. S. 499, 16 Sup. Ct. 864; see also, *Thomas v. State*, 109 Ala. 25, 19 So. 403; *State v. Rodman*, 62 Iowa 456, 17 N. W. 663; *State v. Brooks*, 92 Mo. 542, 5 S. W. 257; *Fox v. People*, 95 Ill. 71.

¹¹⁷ *Harper v. State*, 83 Miss. 402, 35 So. 572.

¹¹⁸ *Weightnovel v. State*, (Fla.) 35 So. 856.

¹¹⁹ *Walker v. State*, 139 Ala. 56, 35 So. 1011.

¹²⁰ *State v. Marshall*, 115 Mo. 383, 22 S. W. 452; *Walker v. State*, 13 Tex. App. 618; *People v. Cleveland*, 107 Mich. 367, 65 N. W. 216.

¹²¹ *State v. Bickle*, 53 W. Va. 597, 45 S. E. 917; *State v. Wilkins*, 66 Vt. 1, 28 Atl. 323; *Johnston v. State*, 94 Ala. 35, 10 So. 667; *People v. Montgomery*, 53 Cal. 576; *People v. Rathbun*, 21 Wend. (N. Y.) 509.

¹²² Compare, for instance, *People v. Gordon*, 40 Mich. 716; *Knickerbocker v. People*, 43 N. Y. 177, at opposite extremes.

¹²³ *Considine v. United States*, 50 C. C. A. 272, 112 Fed. 342; *Wilson v. United States*, 162 U. S. 613, 16 Sup. Ct. 895; *People v. Wong Chong Suey*, 110 Cal. 117, 42 Pac. 420;

it does not necessarily raise a presumption of guilt in the true sense, and the rule, stated as a presumption at least, does not apply where the circumstances under which the possession was acquired are proved.¹²⁴ As said in a recent case: "The law does not attach a 'presumption of guilt' to any given circumstance, nor does it require the accused to 'overcome the presumption thereby raised,' in order to be entitled to an acquittal. What the law does say is that the fact of possession is evidence of guilt upon which a conviction may properly be returned, unless the other facts or circumstances developed be such that, notwithstanding the recent possession, the jury still entertains a reasonable doubt of the defendant's participation in the crime. It is in this sense that the words 'presumption' and 'prima facie evidence' must be understood when employed in this connection."¹²⁵ The possession should not be too remote,¹²⁶ although if it has any probative value it is generally for the jury to say what weight it shall be given in the particular case, and it must be personal and exclusive rather than merely constructive.¹²⁷ So, the defendant may

Branson v. Commonwealth, 92 Ky. 330, 17 S. W. 1019; *Blaker v. State*, 130 Ind. 203, 29 N. E. 1077; *Gravitt v. State*, 114 Ga. 841, 40 S. E. 1003, 88 Am. St. 63; *King v. State*, 99 Ga. 686, 26 S. E. 480; *State v. Conway*, 56 Kans. 682, 44 Pac. 627, *State v. Frahm*, 73 Iowa 355, 35 N. W. 451; *Methard v. State*, 19 Ohio St. 363; *Graveley v. Commonwealth*, 86 Va. 396, 10 S. E. 431; *Metz v. State*, 46 Neb. 547, 65 N. W. 190; *Dobson v. State*, 46 Neb. 250, 64 N. W. 956; *Smith v. People*, 103 Ill. 82; *Magee v. People*, 139 Ill. 138, 28 N. E. 1077; Vol. I, § 156.

¹²⁴ *State v. Spencer*, (Del.) 53 Atl. 337; *State v. Freedman*, 3 Pen. (Del.) 403, 53 Atl. 356; *Roberts v. State*, 11 Wyo. 66, 70 Pac. 803; see also, *State v. Hodge*, 50 N. H. 510; *Wilson v. United States*, 162 U. S. 613, 16 Sup. Ct. 895; *Smith v. State*, 133 Ala. 145, 31 So. 806, 91 Am. St. 21, and note; *Hunt v. Commonwealth*, 13 Gratt. (Va.) 757, 70 Am. Dec. 443, and notes; *Gravitt v.*

State, 114 Ga. 841, 40 S. E. 1003, 88 Am. St. 63.

¹²⁵ *State v. Brady*, 121 Iowa 561, 97 N. W. 62, 64, citing, *Smith v. State*, 58 Ind. 340; *Ingalls v. State*, 48 Wis. 647, 4 N. W. 785; *Commonwealth v. Randall*, 119 Mass. 107; *Smith v. People*, 103 Ill. 82; *Branson v. Commonwealth*, 92 Ky. 330, 17 S. W. 1019; *People v. Titherington*, 59 Cal. 598; see also, *Gravitt v. State*, 114 Ga. 841, 40 S. E. 1003, 88 Am. St. 63, explaining prior Georgia cases in which the term "presumption" had been used.

¹²⁶ See, *Goldstein v. People*, 82 N. Y. 231; *State v. Castor*, 93 Mo. 242, 5 S. W. 906; *Davis v. State*, 50 Miss. 86; *Jones v. State*, 26 Miss. 247; *White v. State*, 72 Ala. 195; *Rex v. Adams*, 3 Car. & P. 600; *Rex v. Cruttenden*, 6 Jur. 267.

¹²⁷ *State v. Castor*, 93 Mo. 242, 5 S. W. 906; *State v. Lackland*, 136 Mo. 26, 37 S. W. 812; *People v. Wilson*, 151 N. Y. 403, 45 N. E. 862; *State v. Deyoe*, 97 Iowa 744, 66 N.

explain it.¹²⁸ Thus, he may show that he bought the property,¹²⁹ or otherwise give such an explanation as to create a reasonable doubt of his guilt.¹³⁰ Further consideration of this subject in this connection, however, is unnecessary, as it will be treated in connection with particular crimes, such as burglary and larceny.

§ 2726. Defenses.—Some of the most common defenses, such as insanity, drunkenness and the like, have been referred to in this chapter in connection with criminal capacity. But, they as well as others, such as alibi, and former conviction or acquittal, for instance, will be treated in subsequent sections. Self-defense, and similar defenses will be treated in chapters on crimes in prosecutions for which they are most often presented.¹³¹ It is the purpose in this section to refer only to a few instances of the admissibility of evidence in defense. As a general rule, the defendant may introduce any proper evidence to rebut that introduced by the prosecution and tending to show that no crime was committed or that he is not guilty of the crime charged. For this purpose he may even show, in connection with other evidence, at least where the evidence tending to connect him with the crime is wholly circumstantial, that another person was capable and had a motive and was in a situation to have committed it.¹³² So, he may generally show absence of motive on his part, or absence of the requisite criminal intent and all other relevant matters admissible in defense under the issues, and may introduce character and impeaching evidence under rules elsewhere stated. But ignorance of the law or even of a state of facts which the accused

W. 733; *Funderburg v. State*, (Tex.) 34 S. W. 613.

¹²⁸ *Harris v. State*, 17 Tex. App. 177; *Lewis v. State*, 29 Tex. App. 201, 14 S. W. 1008; *Hall v. State*, 34 Ga. 208; *Chambers v. State*, 62 Miss. 108; *State v. Owaley*, 111 Mo. 450, 20 S. W. 194.

¹²⁹ *Jones v. People*, 12 Ill. 259.

¹³⁰ *State v. Cross*, 95 Iowa 629, 64 N. W. 614; *State v. Peterson*, 67 Iowa 564, 25 N. W. 780; *Crawford v. State*, 113 Ala. 661, 21 So. 64; *State v. Moore*, 101 Mo. 316, 14 S. W. 182; *Blaker v. State*, 130 Ind. 203, 29 N. E. 1077; *Hart v. State*,

22 Tex. App. 563, 3 S. W. 741; *Clark v. State*, 30 Tex. App. 402, 17 S. W. 942.

¹³¹ See also, elaborate note in 74 Am. St. 707-717.

¹³² *Leonard v. Territory*, 2 Wash. Ter. 381, 7 Pac. 872; *Carlton v. People*, 150 Ill. 181, 37 N. E. 244, 41 Am. St. 346 (but he cannot do it by admissions or confessions of a third person not under oath); *Dubose v. State*, 10 Tex. App. 230, 246; *State v. Johnson*, 31 La. Ann. 368; *State v. Edwards*, 71 Mo. 312; *Dean v. Commonwealth*, 32 Gratt. (Va.) 912.

is bound to know under the law, as a rule, constitutes no defense or justification for a criminal offense.¹³³ A private individual cannot license the commission of a crime, and consent of the person injured is therefore no defense, as a general rule, to a crime against the public,¹³⁴ nor, if the offense is voluntarily committed by the accused, is the mere fact that decoy letters or the like were used a good defense;¹³⁵ but there are some cases as, for instance, in the case of larceny, in which an essential element of the crime is that the act should be committed without the consent of the injured party.¹³⁶

§ 2727. **Alibi.**—Some courts hold that the burden of proving an alibi is upon the defendant, in accordance with the rule that the burden of proof is always upon the party asserting an affirmative fact, or one peculiarly within his own knowledge.¹³⁷ Even where this

¹³³ *State v. Downs*, 116 N. Car. 1064, 21 S. E. 689; *Commonwealth v. Weiss*, 139 Pa. St. 247, 21 Atl. 10, 23 Am. St. 182, in both of which cases it was so held even though the act was under the advise of counsel; see also, *Atkins v. State*, 95 Tenn. 474, 32 S. W. 391; *Stow v. Converse*, 3 Conn. 325, 8 Am. Dec. 189; *State v. Williams*, 36 S. Car. 493, 15 S. E. 554; *State v. Sasse*, 6 S. Dak. 212, 60 N. W. 853, 55 Am. St. 834; *United States v. Reder*, 69 Fed. 965; but compare, *State v. Yeargan*, 117 N. Car. 706, 23 S. E. 153; *Stern v. State*, 53 Ga. 229, 21 Am. R. 266; *Farrell v. State*, 32 Ohio St. 456, 30 Am. R. 614; *Lee v. Lacey*, 1 Cranch (U. S.) 263.

¹³⁴ *Commonwealth v. Snow*, 116 Mass. 47; *Newman v. People*, 23 Colo. 300, 47 Pac. 278; *People v. Liphardt*, 105 Mich. 80, 62 N. W. 1022; *Reg. v. Alison*, 8 Car. & P. 418.

¹³⁵ *Grimm v. United States*, 156 U. S. 604, 15 Sup. Ct. 470; *Price v. United States*, 165 U. S. 311, 17 Sup. Ct. 366; *Montgomery v. United States*, 162 U. S. 410, 16 Sup. Ct. 797; *Tripp v. Flanigan*, 10 R. I. 128; *State v. Stickney*, 53 Kans.

308, 36 Pac. 714, 42 Am. St. 285; *State v. Hayes*, 105 Mo. 76, 16 S. W. 514, 24 Am. St. 360.

¹³⁶ *State v. Hull*, 33 Ore. 56, 54 Pac. 159, 72 Am. St. 694, and note; *Zink v. People*, 77 N. Y. 114, 33 Am. R. 589; *State v. Adams*, 115 N. Car. 775, 20 S. E. 722; *Thompson v. State*, 18 Ind. 386, 81 Am. Dec. 364-367, and notes; *Allen v. State*, 40 Ala. 334, 91 Am. Dec. 482, 483; *State v. Cooper*, 22 N. J. L. 52, 51 Am. Dec. 248; *State v. Beck*, 1 Hill L. (S. Car.) 363, 26 Am. Dec. 190 (no assault and battery where consent); *Smith v. State*, 12 Ohio St. 466, 80 Am. Dec. 355 (same); *Love v. People*, 160 Ill. 501, 43 N. E. 710; *People v. McCord*, 76 Mich. 200, 42 N. W. 1106.

¹³⁷ *Holley v. State*, 105 Ala. 100, 17 So. 102; *State v. Thornton*, 10 S. Dak. 349, 73 N. W. 196, 41 L. R. A. 530; *Carlton v. People*, 150 Ill. 181, 37 N. E. 244, 41 Am. St. 346; *Miles v. State*, 93 Ga. 117, 19 S. E. 805, 44 Am. St. 140; *State v. Beasley*, 84 Iowa 83, 50 N. W. 570; *State v. Jennings*, 81 Mo. 185, 51 Am. R. 236; *State v. Fenlason*, 78 Me. 495, 7 Atl. 385.

is the rule, however, it is generally held to be only a qualified burden to make such proof as will create or raise a reasonable doubt. The jury may and should consider defendant's evidence of an alibi in connection with all the evidence in the case; and the better rule seems to be, no matter what view is taken as to the burden of producing evidence, that the state is required to convince them of his guilty participation in the crime, time and place being essential ingredients in this participation, beyond a reasonable doubt upon all the evidence.¹²⁸ And there are many cases in which it is said that the burden does not shift from the prosecution even where an alibi is relied on as a defense.¹²⁹ The authorities are conflicting as to whether

¹²⁸ *State v. Maher*, 74 Iowa 77, 37 N. W. 2; see also, *State v. Conway*, 56 Kans. 682, 44 Pac. 627; *State v. Harvey*, 131 Mo. 339, 32 S. W. 1110; *State v. Lowry*, 42 W. Va. 205, 24 S. E. 561; *People v. Pichette*, 111 Mich. 461, 69 N. W. 739; *Borrego v. Territory*, 8 N. Mex. 446, 46 Pac. 349; *Ackerson v. People*, 124 Ill. 563, 16 N. E. 847, 849; *Hauser v. People*, 210 Ill. 253, 71 N. E. 416; *Ware v. State*, 59 Ark. 379, 392, 27 S. W. 485; *Walters v. State*, 39 Ohio St. 215, 217; *Chappel v. State*, 7 Coldw. (Tenn.) 92; *State v. Ward*, 61 Vt. 153, 192, 17 Atl. 483; *Bennett v. State*, 30 Tex. App. 341, 17 S. W. 545; *State v. Chee Gong*, 16 Ore. 534, 538, 19 Pac. 607; in *Watson v. Commonwealth*, 95 Pa. St. 418, 422, it is said: "An alibi is as much a traverse of the crime charged as any other defense, and proof tending to establish it, though not clear, may, with other facts of the case, raise a reasonable doubt of the guilt of the accused. When the evidence is so imperfect as not to satisfy the minds of the jury they will not find the fact. Where the commonwealth rests upon positive and undoubted proof of the prisoner's guilt, it should not be overcome by less than full, clear and satisfac-

tory evidence of the alleged alibi. But the evidence tending to establish an alibi, though not sufficient to work an acquittal, should not be excluded from the case, for the burden of proof never shifts, but rests upon the commonwealth throughout, upon all the evidence given in the cause, taken together to convince the jury, beyond a reasonable doubt, of the prisoner's guilt." The whole subject is considered and the authorities are reviewed in the elaborate note to *State v. Thornton*, 41 L. R. A. 530-543.

¹²⁹ See, *State v. Freeman*, 100 N. Car. 429, 5 S. E. 921; *McNamara v. People*, 24 Colo. 61, 48 Pac. 541; *Shultz v. Territory*, (Ariz.) 52 Pac. 352; *State v. Child*, 40 Kans. 482, 20 Pac. 275; *Parker v. State*, 136 Ind. 284, 292, 35 N. E. 1105; *Walters v. State*, 39 Ohio St. 215; *State v. Chee Gong*, 16 Ore. 534, 19 Pac. 607; *State v. McClellan*, 23 Mont. 532, 59 Pac. 924, 75 Am. St. 558, and note. The attempt and failure to prove an alibi is not an admission of the crime, and raises no presumption that the accused was at the place when and where it was committed. *Toler v. State*, 16 Ohio St. 583.

it is necessary in order to establish an alibi, that the entire time during which the offense was committed should be covered so as to exclude the possibility of the defendant's presence, but it is believed that it is not absolutely essential in all cases, at least to the admissibility of the evidence, that it should cover the entire time during which the crime may have been committed, and show that it was absolutely impossible that he could have been present.¹⁴⁰

§ 2728. **Insanity.**—The views of the authors as to the effect of the presumption of innocence, on the one hand, and that of sanity on the other, and as to the burden of proof where insanity is relied on as a defense, have already been presented.¹⁴¹ The following intelligent treatment of the subject by another writer may serve to throw additional light upon it. "The authorities are in conflict on the question upon whom lies the burden of proving the sanity or insanity of the defendant. The decisions range all the way from the statement that the prosecution must prove the sanity of the accused beyond a reasonable doubt to the proposition that the defendant must establish his insanity in an equally positive manner. That the burden is upon the defendant of proving his insanity beyond a reasonable doubt is probably not the law anywhere at the present day, with the exception of Louisiana.¹⁴² There are, however, three statements of the rule concerning the burden of proof which are found in the reported cases. One is that the burden of proof is on the state to establish the sanity of the accused beyond a reasonable doubt.¹⁴³ The legal presumption that every man is sane, however, obviates the necessity of introducing any evidence at all until this presumption is overthrown. When this occurs, the state must, in some jurisdictions, prove sanity beyond a reasonable doubt. The conflict in the cases, as we shall see, relates to when this legal presumption of sanity is sufficiently overthrown or weakened as to render it not conclusive.

¹⁴⁰ See, *West v. State*, 48 Ind. 483; *Beavers v. State*, 103 Ala. 36, 15 So. 616; *Pollard v. State*, 53 Miss. 410, 24 Am. R. 703; *Henry v. State*, 51 Neb. 149, 70 N. W. 924; *Stuart v. People*, 42 Mich. 255, 3 N. W. 863; but see, *Briceland v. Commonwealth*, 74 Pa. St. 463; *Klein v. People*, 113 Ill. 596; *Johnson v. State*, 59 Ga. 142; *Barr v. People*, 30 Colo. 522, 71 Pac. 392; for review of authorities, see, 41 L. R. A. 541-543, note.

¹⁴¹ Vol. I, §§ 126, 139.

¹⁴² *State v. DeRance*, 34 La. Ann. 186, 44 Am. R. 426; *State v. Clements*, 47 La. Ann. 1088, 17 So. 502.

¹⁴³ *Ford v. State*, 73 Miss. 734, 19 So. 665; *Davis v. United States*, 160 U. S. 469, 16 Sup. Ct. 353; *Hopps v. People*, 31 Ill. 385, 83 Am. Dec. 281.

Another and perhaps the largest line of authorities states the rule to be that the burden is on the defendant to prove his insanity by a preponderance of the evidence.¹⁴⁴ Still a third line of cases hold that if the jury have a reasonable doubt as to whether the accused is sane or not they must acquit, and while the burden rests upon the defendant of introducing evidence to raise this doubt, such evidence need not preponderate, but is ample if it is sufficient to produce a reasonable doubt in the minds of the jury.¹⁴⁵ All the authorities start with two fundamental propositions upon which they are in complete harmony: (1) That the burden is on the prosecution to prove beyond a reasonable doubt that the defendant committed the crime; and (2) the law presumes every man to be sane. The conflict in the decision arises by reason of the fact that the courts differ in their opinion as to how much evidence is necessary to overthrow this original presumption of sanity, and as to what quantum of evidence is sufficient to enable the court to say to the jury that the burden of proving the crime beyond a reasonable doubt has been successfully borne. The burden is upon the state to establish the guilt of the defendant beyond a reasonable doubt. To constitute a crime there must coexist a criminal act with a criminal intent. To prove the intent without the act is as equally futile to establish criminal liability as to prove the act without the intent. Both are essential. And if the defendant was so insane as to be incapable of having any intent to

¹⁴⁴ *Graves v. State*, 45 N. J. L. 347, 46 Am. R. 778; *State v. Redemeier*, 71 Mo. 173, 36 Am. R. 462; *Ortwein v. Commonwealth*, 76 Pa. St. 414, 18 Am. R. 420; *Parsons v. State*, 81 Ala. 577, 2 So. 854, 60 Am. R. 193; *Commonwealth v. Rogers*, 7 Metc. (Mass.) 500, 41 Am. Dec. 458; *State v. McCoy*, 34 Mo. 531, 86 Am. Dec. 121; *Kelch v. State*, 55 Ohio St. 146, 45 N. E. 6, 60 Am. St. 680; *Ryder v. State*, 100 Ga. 528, 28 S. E. 246, 62 Am. St. 334; *State v. Trout*, 74 Iowa 545, 38 N. W. 405, 7 Am. St. 499; *State v. Alexander*, 30 S. Car. 74, 8 S. E. 440, 14 Am. St. 879; *Keener v. State*, 97 Ga. 388, 24 S. E. 28; *State v. Wright*, 134 Mo. 404, 35 S. W. 1145; *State v. Bell*, 136 Mo. 120, 37 S. W. 823; *People v.*

Bell, 49 Cal. 485; *People v. Allender*, 117 Cal. 81, 48 Pac. 1014; *People v. Hettick*, 126 Cal. 425, 58 Pac. 918; *State v. Parks*, 93 Me. 208, 44 Atl. 899; *Carlisle v. State*, (Tex.) 56 S. W. 365; *State v. Larkins*, 5 Idaho 200, 47 Pac. 945.

¹⁴⁵ *Hopps v. People*, 31 Ill. 385, 33 Am. Dec. 231; *State v. Bartlett*, 43 N. H. 224, 80 Am. Dec. 154; *Polk v. State*, 19 Ind. 170, 81 Am. Dec. 382; *Chase v. People*, 40 Ill. 352; *Guetig v. State*, 66 Ind. 94, 32 Am. R. 99; *Plake v. State*, 121 Ind. 433, 23 N. E. 273, 16 Am. St. 408; *Dacey v. People*, 116 Ill. 555, 6 N. E. 165; *Brotherton v. People*, 75 N. Y. 159; *Dove v. State*, 3 Heisk. (Tenn.) 348.

commit the crime, he has not, in contemplation of law, committed any offense for which he can be held responsible. The burden, then, is on the state to establish both of these conditions of guilt beyond a reasonable doubt. From this there seems to us but one logical conclusion, which is, that, after the evidence is all in, and the case is submitted to the jury, if the jury have any reasonable doubt as to the sanity of the accused they must acquit. The question is not open to dispute that if the jury had a reasonable doubt as to whether the defendant committed the act or not they must acquit, since in such a case the state has not proved beyond a reasonable doubt that the defendant has committed the act with which he is charged. In reason, then, why should not the jury acquit if they have a reasonable doubt as to the existence of the other question of guilt, viz., a mind sane enough to be capable of entertaining a criminal intent? Both conditions are essential to constitute the crime, and the proof requisite to conviction should in like manner be the same in both cases."¹⁴⁶

§ 2729. Intoxication.—It is often said that intoxication is no excuse for crime, and, as a general rule, it is true that voluntary drunkenness is not a good defense.¹⁴⁷ But the intoxication or use of liquor may have been so long continued as to have affected the mind and to have rendered the accused insane. In such a case, evidence thereof is usually relevant, but it is the insanity rather than its cause that constitutes the defense.¹⁴⁸ So, where a specific intent or premeditation is essential to constitute the crime charged, evidence of intoxication is often relevant and admissible to show that the accused could not have entertained such intent¹⁴⁹ or formed such premeditated

¹⁴⁶ *Knights v. State*, 58 Neb. 225, 78 N. W. 508, 76 Am. St. 78, and note. Comm. 25, 26; note in 31 Cent. L. J. 113.

¹⁴⁷ *Goodwin v. State*, 96 Ind. 550; *Garner v. State*, 28 Fla. 113, 9 So. 835; *People v. Miller*, 114 Cal. 10, 45 Pac. 986; *Conly v. Commonwealth*, 17 Ky. L. R. 678, 32 S. W. 285; *McCook v. State*, 91 Ga. 740, 17 S. E. 1019; *State v. Murphy*, 118 Mo. 7, 25 S. W. 95; *People v. Rogers*, 18 N. Y. 9, 72 Am. Dec. 484; *Upstone v. People*, 109 Ill. 169; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; 1 Hale P. C. 32; 4 Blackstone

¹⁴⁸ *People v. Travers*, 88 Cal. 233, 26 Pac. 88; *People v. Fellows*, 122 Cal. 233, 54 Pac. 830; *Beasley v. State*, 50 Ala. 149; *People v. Rogers*, 18 N. Y. 9, 72 Am. Dec. 484; *Maconnehey v. State*, 5 Ohio St. 77; *Evers v. State*, 31 Tex. Cr. App. 318, 20 S. W. 744, 37 Am. St. 811; *State v. Robinson*, 20 W. Va. 713, 43 Am. R. 799; *French v. State*, 93 Wis. 325, 67 N. W. 706.

¹⁴⁹ *Chrisman v. State*, 54 Ark. 283, 15 S. W. 889; *Wood v. State*, 34 Ark.

design.¹⁵⁰ Evidence of intoxication to such an extent that the accused must have been physically unable to do the act charged may also be received in a proper case.¹⁵¹ A witness, although not an expert, may testify as to the fact of intoxication.¹⁵² And it has been held that evidence of the conduct of the accused on previous occasions when intoxicated may be received as tending to illustrate or show his condition at the time in question.¹⁵³ But the witness cannot give his opinion or conclusion as to whether the accused was so intoxicated as to be incapable of forming or entertaining a criminal intent,¹⁵⁴ or so drunk as not to know what he was doing.¹⁵⁵

§ 2730. **Former jeopardy.**—It is provided in nearly every constitution, at least in this country, that no person shall be twice put in jeopardy for the same offense, but it has been said that this principle is imbedded in the very elements of the common law and that even in the absence of positive enactment the pleas of *autrefois acquit* and of *autrefois convict* are allowed in all criminal cases.¹⁵⁶ It is not within the scope of this work to treat at length of the vexed question as to what constitutes former jeopardy and when it attaches, but important contributions to the subject will be found in the reference given below.¹⁵⁷ “If the formal acquittal,” says Professor Green-

341; *State v. Fiske*, 63 Conn. 388, 28 Atl. 572; *Commonwealth v. Hagenlock*, 140 Mass. 125, 3 N. E. 36; *State v. Garvey*, 11 Minn. 154; *Scott v. State*, 12 Tex. App. 31; *Aszman v. State*, 123 Ind. 347, 24 N. E. 123; *State v. Donovan*, 61 Iowa 369, 16 N. W. 206; *State v. Zorn*, 22 Ore. 591, 30 Pac. 317; *Cline v. State*, 43 Ohio St. 332, 1 N. E. 22; see also, *Pigman v. State*, 14 Ohio 555; *Lytle v. State*, 31 Ohio St. 196.

¹⁵⁰ *Garner v. State*, 28 Fla. 113, 9 So. 835; *People v. Cummins*, 47 Mich. 334, 11 N. W. 184; *Commonwealth v. Dorsey*, 103 Mass. 412; *State v. Mowry*, 37 Kans. 369, 15 Pac. 282; *Cluck v. State*, 40 Ind. 263; *Bernhardt v. State*, 82 Wis. 23, 51 N. W. 1009; *Hopt v. People*, 104 U. S. 631.

¹⁵¹ *Ingalls v. State*, 48 Wis. 647, 4 N. W. 785.

¹⁵² *People v. Monteith*, 73 Cal. 7, 14 Pac. 373; *State v. Dolan*, 17 Wash. 499, 50 Pac. 472; *People v. Eastwood*, 14 N. Y. 562; *State v. Pierce*, 65 Iowa 85, 21 N. W. 195; Vol. I, § 678, note 46.

¹⁵³ *Upstone v. People*, 109 Ill. 169; but see, *Commonwealth v. Cloonen*, 151 Pa. St. 605, 25 Atl. 145.

¹⁵⁴ *Armor v. State*, 63 Ala. 173; see also, *State v. Smith*, 49 Conn. 376; *People v. Slack*, 90 Mich. 448, 51 N. W. 533.

¹⁵⁵ *White v. State*, 103 Ala. 72, 16 So. 63.

¹⁵⁶ *United States v. Gilbert*, 2 Sumn. (U. S.) 42; 3 Greenleaf Ev., § 35.

¹⁵⁷ See, 11 Am. St. 228, 229, note; 1 L. R. A. 451, note; 4 L. R. A. 453, note; 44 L. R. A. 694, note; *Re Ascher*, (Mich.) 57 L. R. A. 806; *State v. Howard*, (S. Car.) 58 L. R.

leaf,¹⁵⁸ "was for want of substance in setting forth the offense, or for want of jurisdiction in the court, so that for either of these causes no valid judgment could have been rendered, it is no bar to a second prosecution; but though there be error, yet if it be in the process only, the acquittal of the party is nevertheless a good bar. The sufficiency of the bar is tested by ascertaining whether he could legally have been convicted upon the previous indictment; for if he could not, his life or liberty was not in jeopardy."¹⁵⁹ But, in a recent case, in the Supreme Court of the United States, this doctrine, while admitted to have the support of many authorities, was denied, the court saying: "After the full consideration which the importance of the question demands, that doctrine appears to us to be unsatisfactory in the grounds on which it proceeds, as well as unjust in its operations upon those accused of crime; and, the question being now for the first time presented to this court, we are unable to resist the conclusion that a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing."¹⁶⁰

§ 2731. Former jeopardy—Burden and evidence to sustain.—To sustain the plea of former acquittal, conviction or jeopardy, the burden is generally held to be upon the defendant¹⁶¹ to prove by a pre-

A. 685, 870; 59 L. R. A. 578, note; 18 Cent. L. J. 43, 63, 392, note; 60 Cent. L. J. 184.

¹⁵⁸ 3 Greenleaf Ev., § 35.

¹⁵⁹ 2 Hawkins P. C., chap. 35; chap. 36, §§ 1, 10, 15; 2 Hale P. C. 246-248; Commonwealth v. Goddard, 13 Mass. 455; Wharton Am. Cr. Law 190-204; People v. Barrett, 1 Johns. (N. Y.) 66; Rex v. Emden, 9 East 437; Commonwealth v. Peters, 12 Metc. (Mass.) 387; Reg. v. Drury, 3 Cox Cr. Cas. 544, 3 Car. & Kir. 193, 18 L. J. (M. C.) 189; see also, 1 Bishop Cr. Law 1021; Vaux's Case, 4 Coke 44.

¹⁶⁰ Ball v. United States, 163 U. S. 662, 16 Sup. Ct. 1192. The former indictment charged murder, but lacked the requisite fullness and

precision, and the verdict of the jury was received on Sunday, yet the former acquittal was held a bar.

¹⁶¹ Faulk v. State, 52 Ala. 415; Emerson v. State, 43 Ark. 372; Jenkins v. State, 78 Ind. 133; Cooper v. State, 47 Ind. 61; Marshall v. State, 8 Ind. 498; Duncan v. Commonwealth, 6 Dana (Ky.) 295; Vowells v. Commonwealth, 83 Ky. 193, 7 Ky. L. R. 176; Commonwealth v. Wermouth, 174 Mass. 74, 54 N. E. 352; Commonwealth v. Daley, 4 Gray (Mass.) 209; Brown v. State, 72 Miss. 95, 16 So. 202; Rocco v. State, 37 Miss. 357; State v. Wister, 62 Mo. 592; State v. Small, 31 Mo. 197; State v. Andrews, 27 Mo. 267; State v. Ackerman, 64 N. J. L. 99, 45 Atl. 27; People v. Cramer, 5 Park. Cr.

ponderance of the evidence,¹⁶² both the former conviction, acquittal or jeopardy and the identity of the person and of the offense. The identity of the offense may generally be shown by producing the record, and showing that the same evidence, which is necessary to support the second indictment, would have been admissible and sufficient to procure a legal conviction upon the first.¹⁶³ A prima facie case on this point being made out by the prisoner, it has been said that it is then incumbent on the prosecutor to meet it by proof that the offense charged in the second indictment was not the same as that charged in the first.¹⁶⁴ It is not necessary that the two charges should be precisely alike in form, or should correspond in things which are not essential and not material to be proved; the variance, to be fatal must be in matter of substance. The former conviction or acquittal must usually be proved by the record, unless a proper foundation is laid for secondary evidence,¹⁶⁵ but parol evidence is admissible, in a proper case, to show the identity of the offense¹⁶⁶ as well as the person,¹⁶⁷ and, perhaps, on other matters when required by circumstances.¹⁶⁸ "Though the general rule," says Greenleaf, "is thus strongly held against a second trial in criminal cases, yet it has always been held, that, to the plea of autrefois acquit, or

Cas. (N. Y.) 171; *Bainbridge v. State*, 30 Ohio St. 264; *Davidson v. State*, 40 Tex. Cr. App. 285, 49 S. W. 372, 50 S. W. 365.

¹⁶² *State v. Scott*, 1 Kans. App. 748, 42 Pac. 264; *State v. Ackerman*, 64 N. J. L. 99, 45 Atl. 27; *Davidson v. State*, 40 Tex. Cr. App. 285, 49 S. W. 372, 50 S. W. 365; *Willis v. State*, 24 Tex. App. 586, 6 S. W. 857.

¹⁶³ *Archibold Cr. Pl.* 87; *Rex v. Emden*, 9 East 437; *Rex v. Clark*, 1 B. & B. 473; *Rex v. Taylor*, 3 B. & C. 502; 1 Russell Crimes 832; *Commonwealth v. Roby*, 12 Pick. (Mass.) 496; *Rex v. Vandercomb*, 2 Leach C. C. (4th ed.) 316; see also, *Dunn v. State*, 70 Ind. 47; *Moore v. State*, 51 Ark. 130, 10 S. W. 22.

¹⁶⁴ *Rex v. Bird*, 5 Cox Cr. Cas. 11, 2 Eng. L. & Eq. 439; but see, *Com-*

monwealth v. Daley, 4 Gray (Mass.) 209.

¹⁶⁵ *Brown v. State*, 72 Miss. 95, 16 So. 202; *Walter v. State*, 105 Ind. 589, 5 N. E. 735; *Bailey v. State*, 26 Ga. 579; *Robbins v. Budd*, 2 Ohio 16; *State v. Hudkins*, 35 W. Va. 247, 13 S. E. 367.

¹⁶⁶ *State v. Waterman*, 87 Iowa 255, 54 N. W. 359; *Bainbridge v. State*, 30 Ohio St. 364; *Brown v. State*, 72 Miss. 95, 16 So. 202; *Wilkinson v. State*, 59 Ind. 416, 26 Am. R. 84; *Durland v. United States*, 161 U. S. 306, 16 Sup. Ct. 508.

¹⁶⁷ *Reg. v. Austin*, 2 Cox Cr. Cas. 59.

¹⁶⁸ See, *Riley v. State*, 43 Miss. 397; *Bainbridge v. State*, 30 Ohio St. 264; *State v. Smith*, 33 N. Car. 33; *Commonwealth v. Dascom*, 111 Mass. 404; *State v. Judge*, 42 La. Ann. 414, 7 So. 678.

autrefois convict, in prosecutions for misdemeanors, it is a sufficient answer that the formal acquittal or conviction was procured by the fraud or evil practice of the prisoner himself."¹⁶⁹ And it is held that the prisoner is entitled to a trial by jury upon such an issue.¹⁷⁰

§ 2732. Provinces of court and jury.—As a general rule in criminal cases as well as in civil cases it is the province of the court to determine the law and of the jury to determine the facts.¹⁷¹ But in some states the constitution provides that the jurors shall be judges of the law as well as the facts.¹⁷² Even under such constitutional provisions, however, it is generally held that while they may have the power to disregard the instructions of the court, it is their duty to accept such instructions as to the law and the court has the right to so charge,¹⁷³ at least where the jurors are also informed of their

¹⁶⁹ 3 Greenleaf Ev., § 38; Chitty Cr. Law 657; Rex v. Bear, 2 Salk. 646; Rex v. Furser, Sayer 90; Rex v. Davis, 1 Show. 336; Anonymous, 1 Lev. 9; Rex v. Mawbey, 6 Term R. 619; State v. Brown, 16 Conn. 54; State v. Little, 1 N. H. 257; Commonwealth v. Kinney, 2 Va. Cas. 139; Halloran v. State, 80 Ind. 586; State v. Moore, 136 N. Car. 581, 48 S. E. 573.

¹⁷⁰ See, Caldwell v. State, 69 Ark. 322, 63 S. W. 59; Funderburk v. State, (Tex. Cr. App.) 64 S. W. 1059; see also, State v. Ackerman, 64 N. J. L. 99, 45 Atl. 27.

¹⁷¹ Sparf v. United States, 156 U. S. 51, 15 Sup. Ct. 273; Commonwealth v. Porter, 10 Metc. (Mass.) 263; Hamilton v. People, 29 Mich. 173; State v. Burpee, 65 Vt. 1, 25 Atl. 964, 19 L. R. A. 145, 36 Am. St. 775; State v. Smith, 6 R. I. 33; Duffy v. People, 26 N. Y. 588; Erskine's famous contest over this question in libel cases is familiar to all. See, Rex v. St. Asaph, 3 Term R. 428; Rex v. Woodfall, 5 Burr. 2661; Rex v. Oneby, 2 Str. 766. Of course questions as to the admissibility of evidence are ordinarily for

the court. People v. Ivey, 49 Cal. 56; Berry v. State, 31 Ohio St. 219, 27 Am. R. 506; State v. Perioux, 107 La. Ann. 601, 31 So. 1061; State v. Williams, 67 N. Car. 12; Dugan v. Commonwealth, 102 Ky. 241, 43 S. W. 418.

¹⁷² See, Blaker v. State, 130 Ind. 203, 29 N. E. 1077; Hudelson v. State, 94 Ind. 426; State v. Gannon, 75 Conn. 206, 52 Atl. 727; State v. Armstrong, 106 Mo. 395, 16 S. W. 604; Goldman v. State, 75 Md. 621, 23 Atl. 1097; see also, Thompson Tr., §§ 2132-2148.

¹⁷³ State v. Gannon, 75 Conn. 206, 52 Atl. 727; Blaker v. State, 130 Ind. 203, 29 N. E. 1077; Commonwealth v. McManus, 143 Pa. St. 64, 21 Atl. 1018, 14 L. R. A. 89; Ford v. State, 101 Tenn. 454, 47 S. W. 403; but see, Hudelson v. State, 94 Ind. 426, Elliott and Hammond, JJ., however, dissenting. See generally, Commonwealth v. Anthes, 5 Gray (Mass.) 185; United States v. Battiste, 2 Sumn. (U. S.) 240; Montgomery v. State, 11 Ohio 424; 1 Coke Litt. 155b, note 5; 3 Cr. L. Mag. 484; 5 South. L. Rev. (N. S.) 352; Cooley Const. Lim. (4th ed.)

constitutional power. The subject is treated as follows in a recent case: "Whenever a question of law is presented, whether it concern the sufficiency of the complaint, the impaneling of the jury, the admission or rejection of testimony, or the conclusion of law from the facts admitted or found, the court alone answers; whenever the pleadings terminate in an issue of pure fact, the jury alone answers. It happens, however, that there are questions—owing mainly to the form of procedure, but in part to the inherent nature of some questions—where the law and the fact are complicate, where the pure question of fact cannot be fairly determined except in relation to the law, and the pure question of law cannot be determined until the facts are found. It is impossible for the court alone to answer such complicate question without infringing on the province of the jury, or for the jury alone to answer without infringing on the province of the court. In such a case it may be practical for the jury to separate the fact from the law and to find the facts, leaving the court to then declare the law; if so, the jury returns a special verdict, finding the facts involved in the complicate question, and the court declares the law on the facts so found. Here court and jury still exercise their respective powers separately. But if such separation is impracticable, the respective powers of court and jury are preserved by the judge's stating his determination of the law hypothetically—if the facts are so and so, this is the law—leaving the jury to find the fact in view of the law so determined by the judge, by the return of a general verdict. When the plea of not guilty presents, as the issue, a question in which fact and law are blended, the jury must still answer to the fact, and the court to the law; but whether that answer shall be given separately, by means of a special verdict, whereby the court determines the law directly upon facts already found by the jury, or shall be given, as it were, jointly, by means of a general verdict, whereby the court determines the law hypothetically in respect to the facts as the jury may properly find them, is at the option of the jury. And this opposition, i. e., the right to return a general

397, et seq.; *People v. Worden*, 113 Cal. 569, 45 Pac. 844; *Parrish v. State*, 14 Neb. 60; *Adams v. State*, 29 Ohio St. 412; *State v. Miller*, 53 Iowa 154, 4 N. W. 438; *Edwards v. State*, 53 Ga. 428; *Berry v. State*, 105 Ga. 683, 31 S. E. 592; *State v. Johnson*, 30 La. Ann. 904; but compare, *Fisher v. People*, 23 Ill. 218; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 3 Am. St. 320; *Fowler v. State*, 85 Ind. 538; *State v. Zimmerman*, 31 Kans. 85, 1 Pac. 257; *Beard v. State*, 71 Md. 275, 17 Atl. 1044, 4 L. R. A. 675, 17 Am. St. 536.

verdict upon the issue joined to the jury, is another essential feature in trial of criminal causes by jury. It is evident that, as a general verdict involves an application of law as declared by the court to the facts as found from the evidence, the jury must consider the law in connection with the evidence in reaching their ultimate conclusion; and in this limited sense they may with doubtful accuracy be called judges of the law; but, as the law determined by the courts is the law they must consider, it is clear that, in no sense which involves any independent determination of what the law of the state is, are they the judges of the law."¹⁷⁴ The court may direct a verdict of acquittal in a proper case,¹⁷⁵ but the accused has a constitutional right to a trial by a jury of his peers. For this reason it can seldom happen that a verdict of guilty can properly be directed by the court.¹⁷⁶ This is especially true where the constitution also makes the jurors judges of the law as well as the facts even though they are not the sole and exclusive judges of the law.

§ 2733. Cautionary instructions.—Certain defenses, such as alibi and insanity, are often resorted to by prisoners who are in reality guilty and these defenses are therefore sometimes looked upon with disfavor or suspicion by courts as well as juries. It is in regard to such matters as well as in regard to the credibility of certain witnesses or classes of witnesses, or the weight to be given to their testimony, that error is most often committed by invading the province of the jury. Different courts have taken somewhat different views as to the extent to which cautionary instructions may be given without error, but, while attention may doubtless be called to the general nature of the defense and the jury may be instructed as to what they may take into consideration, in certain respects, in regard to such

¹⁷⁴ *State v. Gannon*, 75 Conn. 206, 52 Atl. 727, 732, 733.

¹⁷⁵ *Commonwealth v. Merrill*, 14 Gray (Mass.) 415; *Commonwealth v. Lowrey*, 158 Mass. 18, 32 N. E. 940; *State v. Trove*, 1 Ind. App. 553, 27 N. E. 878; *State v. Green*, 117 N. Car. 695, 23 S. E. 98; *State v. Warner*, 74 Mo. 83; *People v. Ledwon*, 153 N. Y. 10, 46 N. E. 1046; *State v. Meyer*, 69 Iowa 148, 28 N. W. 484.

¹⁷⁶ *Commonwealth v. Werntz*, 161

Pa. St. 591, 29 Atl. 272; *State v. Winchester*, 113 N. Car. 641, 18 S. E. 657; *State v. Picker*, 64 Mo. App. 127; *Tucker v. State*, 57 Ga. 503; *State v. Wilson*, 62 Kans. 621, 64 Pac. 23, 52 L. R. A. 679; *Perkins v. State*, 50 Ala. 154; *Duffy v. People*, 26 N. Y. 588; *United States v. Taylor*, 11 Fed. 470; but see, *People v. Nuemann*, 85 Mich. 98, 48 N. W. 290; *People v. Elmer*, 109 Mich. 493, 67 N. W. 550.

defenses as well as in determining the credibility of witnesses, it is generally conceded that the court should be careful not to cast discredit upon the defense to the prejudice of the accused, and that the law does not necessarily discredit such defenses, but leaves the matter to the jury to determine as one of fact within their own province,¹⁷⁷ and so where a witness has wilfully testified falsely as to some other material fact, while the court may instruct the jury that they may take this into consideration in weighing his testimony and disregard it all, still the law does not say that they must disregard it, and they should not be so instructed.¹⁷⁸

¹⁷⁷ 31 Cent. L. J. 113, note; 14 Am. 534, 19 Pac. 607; as to insanity: St. 41-44, note; 72 Am. Dec. 539-549, note; as to alibi: *Albin v. State*, 63 Ind. 598; *People v. Lattimore*, 86 Cal. 403, 24 Pac. 1091; *Simmons v. State*, 61 Miss. 243; *State v. Crowell*, 149 Mo. 391, 50 S. W. 893, 73 Am. St. 402; *State v. Chee Gong*, 16 Ore. 534, 19 Pac. 607; as to insanity: *People v. Methever*, 132 Cal. 326, 64 Pac. 481; *Aszman v. State*, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33.

¹⁷⁸ Vol. II, § 956; note in 14 Am. St. 45; see also, Vol. I, § 296; Vol. II, §§ 961, 965, 966, 1047.

CHAPTER CXXVIII.

ABDUCTION.

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2743. Proof of taking away—Suff- iciency.	2757. Corroborative proof.
2744. Proof of intent—Sufficient.	
2745. Abduction for prostitution or concubinage.	

§ 2734. Scope and purpose.—Abduction is a crime defined and governed by statute in perhaps every state in the United States. These various statutes fully cover the common law definition and meaning of abduction, and usually include additional matter. In some cases and states the statutes include: (1) The unlawful taking of persons against their will, usually termed kidnapping; (2) the taking of females for the purpose of prostitution or concubinage; (3) the taking of females for the purpose of forcible marriage or defilement; (4) criminal seduction. It is not within the scope of this chapter to treat these several statutory crimes. But, disregarding the statutory variations, there are many rules and principles of evidence that are common even to these statutory offenses. It is the purpose of

this chapter to give the general rules and principles of evidence relating more especially, if not exclusively, to the crime of abduction as generally known and understood by the term kidnapping and as applied to the taking of females.

Kidnapping.

§ 2735. **Definition and meaning.**—As defined by Blackstone, kidnapping is the forcible abduction or stealing away of a man, woman or child from their own country and sending them into another.¹ It has been said to be a false imprisonment aggravated by conveying the imprisoned person to some other place.² As defined by some courts it is said to be an aggravated species of false imprisonment.³ As defined by some statutes and followed by decisions of some courts, it is a forcible or fraudulent carrying away from his place of residence; or the arresting or imprisonment of any person with intent to have such person carried away from his residence; or secret confinement within the state; or detention against the will, all wilfully and without authority of law.⁴ It is now very generally conceded that the offense is complete without the sending the person away to another country. But it is held that the offense is greatly aggravated by sending the abducted person away from his own country into another.⁵

§ 2736. **Kidnapping—Proof.**—To constitute the crime of kidnapping the proof must show two essential elements: (1) The conveying away against the will and without the consent of the injured person; (2) the absence of any legal warrant or lawful authority.⁶ The of-

¹ 4 Blackstone Comm. 219; Black's Law Dict.—Kidnapping, 678; 2 Bouvier 91; 1 Russell Crimes (3rd ed.) 716; State v. Whaley, 2 Harr. (Del.) 538; Click v. State, 3 Tex. 282; People v. Camp, 139 N. Y. 87, 34 N. E. 755.

² 2 Bishop Cr. Law 750; Click v. State, 3 Tex. 282; Eberling v. State, 136 Ind. 117, 35 N. E. 1023.

³ Click v. State, 3 Tex. 282; Castillo v. State, 29 Tex. App. 127, 14 S. W. 1011; Smith v. State, 63 Wis. 453, 23 N. W. 879.

⁴ Gravett v. State, 74 Ga. 191;

People v. Chu Quong, 15 Cal. 332; State v. Sutton, 116 Ind. 527, 19 N. E. 602; Boes v. State, 125 Ind. 205, 25 N. E. 218; Eberling v. State, 136 Ind. 117, 35 N. E. 1023; Commonwealth v. Blodgett, 12 Metc. (Mass.) 56; Dehn v. Mandeville, 68 Hun (N. Y.) 335, 22 N. Y. S. 984; Smith v. State, 63 Wis. 453, 23 N. W. 879.

⁵ East Pl. Crown 430; Roscoe Cr. Ev. 465; State v. Rollins, 8 N. H. 550; Click v. State, 3 Tex. 282.

⁶ Click v. State, 3 Tex. 282; Castillo v. State, 29 Tex. App. 127, 14

fense may be established in either of two ways: (1) By proof showing that the person was forcibly or fraudulently carried off or decoyed from his place of residence without lawful authority; (2) by proof of an arrest or imprisonment of a person with the intention of carrying him, or having him carried away, in the absence of any lawful authority.⁷

§ 2737. Kidnapping—Common law rule changed.—Under the common law definition of kidnapping in order to establish the crime the proof must show that the person charged either did remove or intended to remove the injured person beyond the state or country. But this common law crime has been generally modified by the statutes of the several states of this country by making the offense consist of either, (1) causing the person to be secretly confined or imprisoned in the state against his will; or (2) causing him to be sent out of the state against his will. To establish the crime under the first division of such a statute the proof must show that the confinement was secret within the state or that the intention existed of such secret confinement. Under such a statute where a person is seized and removed in broad daylight over public highways and railroads in the presence and view of many persons, and taken to an insane asylum and placed in the custody of public officials and in the presence of numerous physicians and other persons, it was held that there was no such secrecy about the transaction or imprisonment as to constitute the crime of kidnapping.⁸

§ 2738. Kidnapping—Proof of intent.—The charge of sending a person out of the state against his will may be sustained by proof of the intention to do so and the seizure and transportation for that purpose, although the person is not actually conveyed out of the state. Nor is it absolutely necessary to prove directly that it was against the will of the person alleged to have been kidnapped. It is sufficient if the proof shows that fraud or deception was practiced upon the person in order to obtain such consent. If it is made to appear that the consent could not have been obtained in the absence of the fraud or deception the statutory requirement of being against the will is fully complied with. On this subject the Supreme Court of New

S. W. 1011; *Maner v. State*, 8 Tex. Cr. App. 361.

⁷ *State v. Kimmerling*, 124 Ind. 382, 24 N. E. 722.

⁸ *People v. Camp*, 139 N. Y. 87, 34

N. E. 755; *People v. De Leon*, 109 N. Y. 226, 16 N. E. 46, 4 Am. St. 447, note; *Smith v. State*, 63 Wis. 453, 23 N. W. 879.

York say: "The consent of the prosecutrix having been procured by fraud, was as if no consent had been given, and the fraud being a part of the original scheme, the intent of the defendant was to cause the prosecutrix to be sent out of the state against her will."⁹ And a person may be guilty of kidnapping under such a statute where it is made to appear that he intended to take or send by a boat to a certain foreign country the person alleged to have been kidnapped, although it subsequently appeared that the vessel was not bound for that country at all. Thus, where a person procured the intoxication of a sailor and caused him to be taken on board a vessel without his consent, and with the intention that he should be taken out of the state, it was held that the offense was complete although the vessel was not in fact intended to leave the state.¹⁰ But in case of stealing a child with the intent unlawfully to detain or conceal it from its parents or other proper person, the proof must show the existence of the intent.¹¹

§ 2739. Kidnapping—Age and consent.—Under most statutory definitions it becomes essential to prove the age of the injured person. The distinction made by these statutes is that under a certain age the offense is complete regardless of the consent of the person abducted. But over the stated age it is essential to prove that the abduction was against the will of the person. So, too, the question of age is essential in the use of force. Under many of these statutes if the person is under a stated age, it is not necessary to prove the use of either force or violence. But over such age the offense is not complete without proving that force was used.¹² The evidence must bring the defendant within all the material words of the statute, as nothing can be taken by intendment; accordingly the proof must show that the person abducted was within the statutory age and that she was a maid or woman-child, as a description by name is not sufficient.¹³

⁹ *People v. De Leon*, 109 N. Y. 226, 16 N. E. 46, 4 Am. St. 447; *Beyer v. People*, 86 N. Y. 369; *Reg. v. Hopkins*, Car. & M. 254. (Mass.) 518; *State v. Sullivan*, 85 N. Car. 507; *Castillo v. State*, 29 Tex. App. 127, 14 S. W. 1011; *Anderson v. Commonwealth*, 5 Rand.

(Va.) 627; *United States v. Aucarola*, 17 Blatch. (U. S.) 423; *Commonwealth v. Robinson*, Thatcher

¹⁰ *Hadden v. People*, 25 N. Y. 373.
¹¹ *Mayo v. State*, 43 Ohio St. 567, 3 N. E. 712.

¹² *State v. Rollins*, 8 N. H. 550; *State v. Farrar*, 41 N. H. 53; *Moody v. People*, 20 Ill. 315; *Commonwealth v. Nickerson*, 5 Allen

Cr. Cas. (Mass.) 488; 2 Bishop Cr. Law 751.
¹³ *State v. O'Bannon*, 1 Bail. (S. Car.) 144.

Where a person within the prohibited age has been abducted it is no defense to show that the defendant believed or had reason to believe that the person was over the statutory age.¹⁴

Abduction.

§ 2740. **Definition and meaning.**—Abduction as distinct from kidnapping has been defined as: "The unlawful taking or detention of any female for the purpose of marriage, concubinage or prostitution."¹⁵ The Supreme Court of North Carolina approved Webster's definition as follows: "The crime is defined in the statute by the term abduction, which is a term of well-known signification and means in law 'the taking and carrying away of a child, a ward, a wife, etc., either by fraud, persuasion or open violence.'"¹⁶ Under the English statute on this subject, from which most of the American statutes were framed, the offense consisted of the taking: (1) of any woman having certain property or expectancies, to be married or defiled; (2) of such a woman being under the age of twenty-one years out of the possession of the person having the lawful custody of her; (3) of any woman of any age by force, with intent to cause her to be married or defiled; (4) of any unmarried girl under the age of sixteen years out of possession of the person having lawful custody of her; (5) of any child under the age of fourteen years with intent to deprive its lawful guardian of its custody.

§ 2741. **Proof of physical force not required.**—Many of the statutes defining abduction provide that the act must be forcible. But the decisions are practically unanimous in holding that it is not necessary to prove actual physical violence in order to establish the forcible taking contemplated by such statutes. The Supreme Court of Illinois approved an instruction on this subject as follows: "To constitute the forcible abduction or stealing of a person within the meaning of the statute, it is not necessary that actual physical force or violence be used upon the person kidnapped. But it will be sufficient, if, to accomplish the removal, the mind of the person was operated upon by the defendants, by falsely exciting the fears, by threats,

¹⁴ *People v. Fowler*, 88 Cal. 136, 25 Pac. 1110; *State v. Johnson*, 115 Mo. 480, 22 S. W. 463.

¹⁵ *Black's Law Dict.* 6.

¹⁶ *State v. George*, 93 N. Car. 567;

Carpenter v. People, 8 Barb. (N. Y.) 603; *State v. Chisenhall*, 106 N. Car. 676, 11 S. E. 518; *Humphrey v. Pope*, 122 Cal. 253, 54 Pac. 847.

fraud or other unlawful or undue influence, amounting substantially to a coercion of the will, so that, if such means had not been resorted to or employed, it would have required force to effect the removal." In commenting on this instruction the court further said: "The statute defines kidnapping to be the forcible abduction or stealing away of a man, woman or child from his or her own country, and sending or taking him or her into another. While the letter of the statute requires the employment of force to complete his crime, it will undoubtedly be admitted by all that physical force and violence are not necessary to its completion. Such a literal construction would render this statutory provision entirely useless. The crime is more frequently committed by threats and menaces than by the employment of actual physical force and violence. If the crime may be committed without actual violence, by menace, it would seem that any threats, fraud or appeal to the fears of the individual, which subject the will of the person abducted and places such person as fully under the control of the other as if actual force were employed, would make the offense as complete as by the use of force and violence."¹⁷

§ 2742. Taking away or detention—Proof sufficient.—The prime essential of the crime is the taking away from the residence or other proper place with an unlawful purpose. What constitutes the taking away is usually not defined by statute; however the statutes sometimes use such words as persuade, entice, inveigle or induce. As previously seen it is not necessary that the proof show the use of actual physical force. It has been held that a defendant may be guilty of such a charge even when he was not present at the time of the taking. And if it is shown that it was by his inducement or persuasion, or that it was through the influence exerted or the inducement held out and the means for leaving provided by the defendant, it is gener-

¹⁷ *Moody v. People*, 20 Ill. 315; 106 N. Car. 676, 11 S. E. 518; *Beyer State v. Bussey*, 58 Kans. 679, 50 v. People, 86 N. Y. 369; *Schnicker Pac.* 891; *People v. Carrier*, 46 Mich. v. People, 88 N. Y. 192; *Eberling* 442, 9 N. W. 487; *State v. Keith*, 47 v. State, 136 Ind. 117, 35 N. E. 1023; *Minn.* 559, 50 N. W. 691; *State v. People v. Seeley*, 37 Hun (N. Y.) *Jamison*, 38 Minn. 21, 35 N. W. 712; 190; *People v. De Leon*, 109 N. Y. *Lampton v. State*, (Miss.) 11 So. 226, 16 N. E. 46, 4 Am. St. 447, note; *656; State v. Johnson*, 115 Mo. 480. *Reg. v. Handley*, 1 Fos. & Fin. 648. *22 S. W.* 463; *State v. Chisenhall*,

ally sufficient. As stated by one court: "It is immaterial whether he took her by the hand and led her away, sent a special conveyance to carry her from her parents, or planned and provided that she should go in a public conveyance. It matters not what agency he provided or employed to take her away; it is enough that he caused or procured her to be taken against the wish of her parents, and that it was done for the illicit purpose."¹⁸ The holdings in some jurisdictions indicate that the statutory taking or detention may be purely fictitious.¹⁹

§ 2743. Proof of taking away—Sufficiency.—To establish the crime of abduction there must be proof of a taking away or out of the custody or possession of another. However, very slight evidence may be sufficient to establish this fact, but it is necessary that there be some positive act to get the female away from the person having the legal charge of her. It is not necessary to establish a fixed distance, nor is it necessary to show that she was kept permanently away from her home or place of residence. Nor is the proof of an intention to keep her permanently away from home essential to the existence of the crime. The rule on this subject is stated by the Supreme Court of Illinois thus: "So we hold in this case, that when the heartless libertine, by his seductive arts, or other means, induces his confiding or intimidated victim, as the case may be, to abandon home and the wholesome restraints of parental authority, to accompany him whithersoever he may see proper to take her, without limit as to time or place, for the purpose of submitting to his licentious embraces and ministering to his unbridled lust, he clearly brings himself within the provisions of the section of the statute we are now considering, and subjects himself to the punishment therein enounced."²⁰

¹⁸ *State v. Bussey*, 58 Kans. 679, 50 Pac. 891; *State v. Overstreet*, 43 Kans. 299, 23 Pac. 572; *Slocum v. People*, 90 Ill. 274; *People v. Carrier*, 46 Mich. 442, 9 N. W. 487; *Beyer v. People*, 86 N. Y. 369; *Schnicker v. People*, 88 N. Y. 192; *People v. Seeley*, 37 Hun (N. Y.) 190; *State v. Chisenhall*, 106 N. Car. 676, 11 S. E. 518; *Payner v. Commonwealth*, (Ky.) 19 S. W. 927; *Humphrey v. Pope*, 122 Cal. 253, 54 Pac. 847.

¹⁹ *Malone v. Commonwealth*, 91 Ky. 307, 15 S. W. 856; *Higgins v. Commonwealth*, 94 Ky. 54, 21 S. W. 231; *Couch v. Commonwealth*, 16 Ky. L. R. 477, 29 S. W. 29; *Howell v. Commonwealth*, 5 Ky. L. R. 174; *State v. Jamison*, 38 Minn. 21, 35 N. W. 712; *State v. Keith*, 47 Minn. 559, 50 N. W. 691; *State v. Johnson*, 115 Mo. 480, 22 S. W. 463.

²⁰ *Henderson v. People*, 124 Ill. 607, 17 N. E. 68; *Slocum v. People*, 90 Ill. 274.

§ 2744. Proof of intent—Sufficient.—The offense may be sufficiently established by proof of two essential elements: (1) The unlawful taking of the person; (2) the intent with which it is done. The gravamen of the offense is the purpose or intent with which the enticing and abduction is done; hence it is not necessary in order to sustain a conviction to make proof of any subsequent acts. The only purpose for which the subsequent acts are proved, or are permitted to be proved, is to establish the intent with which the taking or enticing was done; but if the intent is sufficiently proved without these, the crime is established. This rule is stated as follows: "The offense, if committed at all, is complete the moment the subject of the crime is removed beyond the power and control of her parents, or of others having lawful charge of her, whether any illicit intercourse ever takes place or not. Subsequent acts are only important as affording the most reliable means of forming a correct conclusion with respect to the original purpose and intention of the accused."²¹ And it has been held that the unlawful intent of a defendant might fairly be inferred from the end attained and the circumstances surrounding the case.²² But it is said to be an elementary principle that when a specific intent is required to make an act an offense, that the mere proof of doing the act raises no presumption that it was done with the specific intent.²³

§ 2745. Abduction for prostitution or concubinage.—The offense is not established until the proof shows that the defendant took away the female with the intent of using her for the purpose of prostitution or concubinage, or some other prohibited use. It is not sufficient under such statutes to prove that the taking away was simply for the purpose of having illicit sexual intercourse with the defendant alone. Some statutes, however, make this the crime. But gener-

²¹ *Henderson v. People*, 124 Ill. 607, 17 N. E. 68; *Slocum v. People*, 90 Ill. 274; *People v. Flick*, 89 Cal. 144, 26 Pac. 759; *Gravett v. State*, 74 Ga. 194; *State v. Bussey*, 58 Kans. 679, 50 Pac. 891; *Payner v. Commonwealth*, (Ky.) 19 S. W. 927; *People v. Carrier*, 46 Mich. 442, 9 N. W. 487; *State v. Gibson*, 111 Mo. 92, 19 S. W. 980; *State v. Johnson*, 115 Mo. 480, 22 S. W. 463; *State v. Rorebeck*, 158 Mo. 130, 59 S. W. 67;

People v. Stott, 4 N. Y. Cr. 306; *Commonwealth v. Kaniper*, 3 Pa. Co. Ct. 276.

²² *People v. Flick*, 89 Cal. 144, 26 Pac. 759; *Beyer v. People*, 86 N. Y. 369; *People v. Wah Lee Mon*, 37 N. Y. St. 283, 13 N. Y. S. 767.

²³ *State v. Gibson*, 111 Mo. 92, 19 S. W. 980; *People v. Plath*, 100 N. Y. 590, 3 N. E. 790; *State v. Payne*, 10 Wash. 545, 39 Pac. 157; *Lawson* Pres. Ev. 553.

ally the proof must show that it was for the purpose of prostitution, the meretricious illicit intercourse, an indiscriminate, common intercourse with men.²⁴ But where the charge was the taking away for the purpose of concubinage, the charge was held to be sustained where the proof showed a cohabitation, though but one act of intercourse was proved.²⁵

§ 2746. Purpose of prostitution—Prima facie proof.—It must be made to appear that the taking away of the female was for the unlawful purposes named in the statute, or some one of them. And the intent is the gravamen of the offense, and must be proved as an essential element of the crime. So it has been held that the taking of the abducted person to a house of prostitution or of ill-fame is prima facie proof of the taking for the purpose of prostitution.²⁶

§ 2747. Proof of detention against the will.—Some statutes make the offense to consist of detaining a women against her will with intent to have carnal knowledge with her. To sustain a conviction under such a statute it is only necessary to prove that the defendant detained the complaining witness against her will with the intention to carnally know her. And it is no defense to show that there

²⁴ *People v. Demousset*, 71 Cal. 611, 12 Pac. 788; *Slocum v. People*, 90 Ill. 274; *Henderson v. People*, 124 Ill. 607, 17 N. E. 68; *Bunfill v. People*, 154 Ill. 640, 39 N. E. 565; *Osborn v. State*, 52 Ind. 526; *State v. Ruhl*, 8 Iowa 447; *Commonwealth v. Cook*, 12 Metc. (Mass.) 93; *State v. Stoyell*, 54 Me. 24; *State v. Wilkinson*, 121 Mo. 485, 26 S. W. 366; *State v. Bobbst*, 131 Mo. 328, 32 S. W. 1149; *State v. Rorebeck*, 158 Mo. 130, 59 S. W. 67; *State v. Gibson*, 111 Mo. 92, 19 S. W. 980; *State v. Brow*, 64 N. H. 577; *Carpenter v. People*, 8 Barb. (N. Y.) 603; *People v. Plath*, 100 N. Y. 590, 3 N. E. 790; *People v. Parshall*, 6 Park. Cr. Cas. (N. Y.) 129; *United States v. Zes Cloya*, 35 Fed. 493.

²⁵ *State v. Feasel*, 74 Mo. 524; *State v. Goodwin*, 33 Kans. 538, 6

Pac. 899; *State v. Overstreet*, 43 Kans. 299, 23 Pac. 572; *Osborn v. State*, 52 Ind. 526; *Henderson v. People*, 124 Ill. 607, 17 N. E. 68; *Slocum v. People*, 90 Ill. 274; *State v. Bussey*, 58 Kans. 679, 50 Pac. 891; *People v. Commons*, 56 Mich. 544, 23 N. W. 215; *People v. Bristol*, 23 Mich. 118; *State v. Gibson*, 111 Mo. 92, 19 S. W. 980; *State v. Rorebeck*, 158 Mo. 130, 59 S. W. 67; *State v. Wilkinson*, 121 Mo. 485, 26 S. W. 366; *Commonwealth v. Kaniper*, 3 Pa. Co. Ct. 276; *Tucker v. State*, 8 Lea (Tenn.) 633; *South v. State*, 97 Tenn. 496, 37 S. W. 210; *United States v. Zes Cloya*, 35 Fed. 493.

²⁶ *Brown v. State*, 72 Md. 468, 20 Atl. 186; *Estrado, ex parte*, 88 Cal. 316, 26 Pac. 209; *People v. Flick* 89 Cal. 144, 26 Pac. 759.

was no intention of having the illicit intercourse against her will; the offense under such a statute consists in the detention against the will for the purpose of the sexual intercourse; the crime is complete if the detention is against the will, even though it is to obtain consent to the illicit act.²⁷

§ 2748. Taking from the house without consent of parent or guardian.—These statutes usually prohibit the taking of the female for the purpose of prostitution or concubinage without the consent of the parents, or from the parent's house or wherever she may be found. In order to convict a defendant on such a charge the proof must establish three elements: (1) There must be a taking away within the meaning of the law;²⁸ (2) the existence of the intent;²⁹ (3) it must be without the consent of the parents, or taking from their house. Under such a statute, where it appeared that a girl living with her parents was induced or persuaded to go to some convenient place, away from her father's house but in the immediate neighborhood, for the purpose of prostitution, continuing, however, to dwell with her parents as usual, it was held to be sufficient. The proof need not show that the taking or enticing was to a distant place or for any particular length of time, nor that there was any intention to keep her permanently from her parent's residence.³⁰

§ 2749. Taking from residence or custody—Proof.—The statutes against kidnapping or abduction usually provide in a general way against the taking or carrying of a person from his place of residence, or the taking of a female under a certain age from the residence or custody of her parents or guardian, or those having legal charge of her. To establish the offense under such a statute, the proof must show that there was a carrying or taking of the person either forcibly or fraudulently from his place of residence.³¹ But it

²⁷ *Payner v. Commonwealth*, (Ky.) 19 S. W. 927; *Huff v. Commonwealth*, 18 Ky. L. R. 752, 37 S. W. 1046; *Beaven v. Commonwealth*, (Ky.) 30 S. W. 968; *Wilder v. Commonwealth*, 81 Ky. 591; *Krambiel v. Commonwealth*, 8 Ky. L. R. 605, 2 S. W. 555; *Cargill v. Commonwealth*, (Ky.) 13 S. W. 916; *Higgins v. Commonwealth*, 94 Ky. 54, 21 S. W. 231; *State v. Gordon*, 46

N. J. L. 432; see *Bunfill v. People*, 154 Ill. 640, 39 N. E. 565.

²⁸ See § 2743.

²⁹ See § 2744.

³⁰ *Slocum v. People*, 90 Ill. 274; *State v. Johnson*, 115 Mo. 480, 22 S. W. 463; *Reg. v. Baillie*, 8 Cox Cr. Cas. 238; *Reg. v. Timmins*, 8 Cox Cr. Cas. 401.

³¹ *Boes v. State*, 125 Ind. 205, 25 N. E. 218.

is not necessary in such case to prove that the person alleged to have been kidnapped had acquired a permanent residence at the place from which he was so taken. It is sufficient if the proof shows that the person was at a place where he had a right to be.³² The statute contemplates an actual state of things and not the existence of a legal relation, and an orphan living in a family without legal guardianship, or a girl abandoned by her parents and given a home by a charitable person is within the meaning of the statute. It is presumed that every female within the prohibited age, who is not already depraved, is in the legal charge of some one.³³

§ 2750. Taking from parents without consent.—The prohibition of the statutes usually applies to the taking of the females under certain age without consent or against the will of the parents or guardian, or other persons in whose charge they are. Under the rules formerly given the taking must be for the illicit purpose. The agencies employed are immaterial, if it is sufficient to induce the female to leave against the wish of her parents.³⁴ But it is not always necessary to allege or prove that such taking was without the consent of parent or guardian; it has been held to be proper to allege and prove from whose custody the female was taken;³⁵ but not necessary.³⁶ The father and mother or other person may testify that the daughter was taken without their consent, and it is proper for them to state any and all efforts made to find her.³⁷ Proof of declarations of a parent of an abducted child is competent and material for the purpose of showing the want of consent to the taking, where the statute provides that the taking must be without the consent or against the will of the parent. But the consent of the parent or guardian is a matter of defense, and must be established by the defendant.³⁸ Nor is the

³² *Wallace v. State*, 147 Ind. 621, 47 N. E. 13.

³³ *People v. Carrier*, 46 Mich. 442, 9 N. W. 487.

³⁴ *State v. Bussey*, 58 Kans. 679, 50 Pac. 891; *State v. Rorebeck*, 158 Mo. 130, 59 S. W. 67; *People v. Seeley*, 37 Hun (N. Y.) 190; *State v. Ruhl*, 8 Iowa 447; *People v. Marshall*, 59 Cal. 386; *People v. Carrier*, 46 Mich. 442, 9 N. W. 487; *Reg. v. Manktelow*, 6 Cox Cr. Cas. 143; *Reg. v. Timmins*, 8 Cox Cr. Cas. 401; *Reg. v. Ollifer*, 10 Cox Cr. Cas. 403.

³⁵ *State v. Jamison*, 38 Minn. 21, 35 N. W. 712; *Tucker v. State*, 8 Lea (Tenn.) 633; *Scruggs v. State*, 90 Tenn. 81, 15 S. W. 1074; *South v. State*, 97 Tenn. 496, 37 S. W. 210.

³⁶ *State v. Keith*, 47 Minn. 559, 50 N. W. 691.

³⁷ *State v. Stone*, 106 Mo. 1, 16 S. W. 890; *State v. Bobbst*, 131 Mo. 328, 32 S. W. 1149.

³⁸ *State v. Chisenhall*, 106 N. Car. 676, 11 S. E. 518.

parent required to inform the person who attempts, or who intends to abduct his daughter that it is against his consent; it is not essential to the guilt of the defendant, that he should be notified of the father's unwillingness to relinquish his authority over his child; the father is under no obligation to remonstrate with one who attempts or seeks to abduct his daughter; such a course might precipitate the event he wished to prevent.³⁹ Some statutes do not include the taking away against the will or without the consent of the parent or guardian. In such cases no proof is required on the question of the taking against the will or without parental consent.⁴⁰ Where the female abducted is within the prohibited age, it is no defense to show that the taking, or the acts of illicit intercourse, was with her consent; it is sufficient if it is without the consent or against the will of the parents.⁴¹ And where the charge is that of taking of a girl within the prohibited age from the custody of her parents or guardian it is not necessary to prove that the female was taken from the actual custody of the parents or guardian, but proof of legal custody at the time the child is taken is sufficient although it is shown that such female was actually taken from some other person.⁴²

§ 2751. Taking against the will of the person abducted.—The statute against the abduction of females above a certain age for the purpose of prostitution or concubinage not only provides that the act shall be forcible but also that it must be against the will of the person abducted. The instances are very rare where a woman of mature years is forcibly and bodily seized and carried away for such illegal and immoral purposes against her will. Almost all of the reported cases are those where the consent has been obtained by fraud or the

³⁹ Gravett v. State, 74 Ga. 191.

⁴⁰ State v. George, 93 N. Car. 567.

⁴¹ People v. Cook, 61 Cal. 478; People v. Demousset, 71 Cal. 611, 12 Pac. 788; People v. Dolan, 96 Cal. 315, 31 Pac. 107; Gravett v. State, 74 Ga. 191; Thweatt v. State, 74 Ga. 821; State v. Bussey, 58 Kans. 679, 50 Pac. 891; State v. Round, 92 Mo. 679; State v. Stone, 106 Mo. 1, 16 S. W. 890; State v. Gibson, 111 Mo. 92, 19 S. W. 980; State v. Johnson, 115 Mo. 480, 22 S. W. 463; State v. Bobbst, 131 Mo. 328, 32 S. W.

1149; Tucker v. State, 8 Lea (Tenn.)

633; Scruggs v. State, 90 Tenn. 81,

15 S. W. 1074; South v. State, 97

Tenn. 496, 37 S. W. 210; United

States v. Aucarola, 17 Blatch. (U.

S.) 423; Reg. v. Manktelow, 6 Cox

Cr. Cas. 143; Reg. v. Kipps, 4 Cox

Cr. Cas. 167; Reg. v. Biswell, 2 Cox

Cr. Cas. 279; Rex v. Ossulston, 2

Str. 1107.

⁴² Estrado, Ex Parte, 88 Cal. 316,

26 Pac. 209; Gandy v. State, 81 Ala.

68, 1 So. 35.

will overcome in some other improper manner.⁴³ Thus where it appeared that the defendant falsely represented to the person abducted that he had procured a situation for her as a servant in a respectable family, and that without any suspicion of his object, and relying upon his statements she was induced to proceed with him to a disreputable house where the crime was consummated. In speaking of this the court said: "It cannot, therefore, be said that she went there voluntarily for the purpose of being defiled, and it is manifest that it was contrary to her will to become the inmate of such a house, and that she neither expected nor contemplated such a result. She was an unwilling victim of misrepresentation, fraud and falsehood, and as the prisoner intended to accomplish her defilement, and she did not go willingly to be defiled, or in any way assent to the act, it is a logical and rational inference that she was taken unlawfully against her will within the meaning of the statute."⁴⁴ The rule is that where the consent is procured by fraud and deception it is the same as if no consent had been given; this applies to both kidnapping and abduction.⁴⁵ In another case the court held that "it was not necessary for the prosecution to show that actual physical violence had been used by the person, to constitute a taking of the prosecutrix against her will within the meaning of the section, but that it was sufficient if she had been induced by deceit or false pretense of the prisoner to go to the place." It is sufficient if the evidence shows a taking without consent, though it may not establish that the taking was against the will.⁴⁶ Where the proof shows that the attempted defilement was made while the female was asleep, it was held to be without her consent and against her will.⁴⁷

§ 2752. Age of female abducted.—All the statutes on the subject of abduction fix an age within which the taking of the female for the unlawful purposes enumerated, without the consent of the parent or other person, constitutes the crime. In other cases the enticing away of women over a stated age without their consent, for the prohibited purposes, constitutes a crime. In either case the proof of the age of the person alleged to have been abducted is an essential in-

⁴³ Gravett v. State, 74 Ga. 191;
Moody v. People, 20 Ill. 315, 316.

⁴⁴ People v. De Leon, 109 N. Y.
226, 16 N. E. 46, 4 Am. St. 447.

⁴⁵ Beyer v. People, 86 N. Y. 369;
Schnicker v. People, 88 N. Y. 192;
People v. De Leon, 109 N. Y. 226,
16 N. E. 46, 4 Am. St. 447.

⁴⁶ People v. Seeley, 37 Hun (N.
Y.) 190.

⁴⁷ Couch v. Commonwealth, 16 Ky.
L. R. 479, 29 S. W. 29.

gredient to constitute the offense. If the female is within the prohibited age, and the prohibited acts are done without the consent of the parent, the crime is complete although the alleged abduction might have been with the consent of the female. In the other case the proof of age is necessary in order to avoid the necessity of proving that it was without the consent or against the will of the parent or guardian. Where the abduction is alleged to be that of a female within the prohibited age, it is no defense to the action that the acts constituting the offense, or any or all of them, were done with the consent of the person alleged to have been abducted.⁴⁸ Nor is it any defense that the person alleged to have been abducted informed the defendant that she was over the age fixed by the statute.⁴⁹ Nor is it any defense that the defendant believed, or had good reasons to believe, that the person alleged to have been abducted was over the prohibited age. In all such cases he acts at his peril, and the fact that he was honestly mistaken in the age of his victim affords no excuse for the commission of the crime.⁵⁰

§ 2753. **Previous chaste character.**—Many of the statutes describing the act of abduction apply the term of “previous chaste character” or an equivalent expression to the person alleged to have been abducted. Under such a statute the question is, what proof must be made as to the alleged previous chaste character? In some jurisdictions it is expressly held that it is not necessary, in the first instance, for the prosecution to offer any evidence on that subject. “The presumption of law is that her previous life and conversation were chaste and the onus was upon the defendant to show otherwise.” But it is not improper to introduce evidence fortifying this legal presumption, and such chastity may be reasonably inferred from evidence of the girl’s previous associations.⁵¹ The proof relating to such previous chaste character must be limited in point of time to that immediately

⁴⁸ *People v. Fowler*, 88 Cal. 136, 25 Pac. 1110; *People v. Stott*, 4 N. Y. Cr. 306.

⁴⁹ *State v. Ruhl*, 8 Iowa 447; *Reg. v. Officer*, 10 Cox Cr. Cas. 402.

⁵⁰ *People v. Dolan*, 96 Cal. 315, 31 Pac. 107; *People v. Fowler*, 88 Cal. 136, 25 Pac. 1110; *State v. Ruhl*, 8 Iowa 447; *State v. Houx*, 109 Mo. 654, 19 S. W. 35; *State v. Johnson*, 115 Mo. 480, 22 S. W. 463; *People*

v. Stott, 4 N. Y. Cr. 306; *Hermann v. State*, 73 Wis. 248, 41 N. W. 171; *Reg. v. Robins*, 1 Car. & Kir. 456; *Reg. v. Prince*, 13 Cox Cr. Cas. 138.

⁵¹ *Slocum v. Slocum*, 90 Ill. 274; *Bradshaw v. People*, 153 Ill. 156, 38 N. E. 652; *Andre v. State*, 5 Iowa 389; *State v. Higdon*, 32 Iowa 262; *People v. Brewer*, 27 Mich. 134, 138; *Carpenter v. People*, 8 Barb. (N. Y.) 603.

preceding the alleged abduction. "The word 'previous,' in this connection, must be understood to mean immediately previous, or to refer to a period terminating immediately previous, to the commencement of the guilty conduct of the defendant. If the female had previously fallen from virtue, but had subsequently reformed and become chaste, there is no doubt that she may be the subject of the offense declared in the statute."⁵² But proof of any acts on the part of the female, subsequent to the time of the alleged abduction by the defendant, is incompetent on his behalf.⁵³

§ 2754. Previous chaste character—Burden of proof.—In a prosecution under a statute that provides that the person abducted must possess a previous chaste character, the burden of proof is generally held to be upon the defendant to show that the person alleged to have been abducted was not of previous chaste character. The presumption of law is that her previous life and conversation were chaste, and this presumption must be overcome by proof on the part of the defendant, and no evidence need be offered by the prosecution in the first instance. Proof of lewd life and conversation after the time of the alleged abduction is not admissible to prove prior unchastity. A defendant will not be permitted to show the result of his nefarious acts as an excuse for having committed them.⁵⁴ But it is held by one court, at least, that under a statute making it a crime for enticing an unmarried woman of chaste life to a house of ill-fame for the purpose of prostitution the burden of proof was on the commonwealth to show that the woman was of chaste life. The reason of this was that the crime consisted in enticing a woman of chaste life to such a place and that the chastity of the woman was an essential ingredient of the crime.⁵⁵

§ 2755. Presumption of previous chaste character.—The previous chaste character meant by the statutes generally on the subject of the abduction of females is not required to be substantiated by proof on

⁵² *Carpenter v. People*, 8 Barb. (N. Y.) 603; *State v. Deltrick*, 51 Iowa 467, 1 N. W. 732; *State v. Dunn*, 53 Iowa 526, 5 N. W. 707. N. E. 652; *State v. Curran*, 51 Iowa 112, 49 N. W. 1006; *State v. Higdon*, 32 Iowa 262; *Polk v. State*, 40 Ark. 482; *Scruggs v. State*, 90 Tenn. 81, 15 S. W. 1074.

⁵³ *Scruggs v. State*, 90 Tenn. 81, 15 S. W. 1074.

⁵⁴ *Slocum v. People*, 90 Ill. 274; *Bradshaw v. People*, 153 Ill. 156, 38 131 Mass. 224. ⁵⁵ *Commonwealth v. Whittaker*,

the part of the prosecution in the first instance. The law presumes such previous chaste character, and this presumption is said to be of probative force. While it is a presumption of law, yet it may be disputed or rebutted. In speaking of an instruction which treated it so, Judge Cooley said: "The presumptions of law should be in accordance with the general fact; and whenever it shall be true of any country, that the women, as a general fact, are not chaste, the foundations of civil society will be wholly broken up. Fortunately, in our own country an unchaste female is comparatively a rare exception to the general rule; and whoever relies upon the existence of the exception in a particular case should be required to prove it."⁵⁶

§ 2756. Proof of previous unchastity as a defense.—It has been held in some jurisdictions that on a charge of abducting a female under the prohibited age it is a sufficient defense to prove her generally bad reputation for chastity, and that she had in fact previously been unchaste.⁵⁷ In one case it was held proper to permit evidence of previous character for chastity as having a material bearing upon the question whether the girl was enticed or persuaded from the control of her parents or whether she went of her own accord, and with the knowledge and consent of her parents.⁵⁸ But the weight of authority as well as reason and good sense are opposed to this view. Such a view could only be upheld where the statute expressly provided that such person was of previous chaste character; but it is clear that such an idea cannot be read into the statute where it is an absolute prohibition within a specified age. The purpose of such a statute is not only to protect the chaste, but to reclaim the erring; it is intended as a guarantee to the parents and guardians of the safe custody and care of girls within the prohibited age without regard to their reputation for chastity. To permit a wretch who has induced or enticed a young girl from her parents for the unlawful purpose contemplated by the statute to justify his nefarious

⁵⁶ *People v. Brewer*, 27 Mich. 134; *Polk v. State*, 40 Ark. 482; *Wilson v. State*, 73 Ala. 527; *Bradshaw v. People*, 153 Ill. 156, 38 N. E. 652; *Andre v. State*, 5 Iowa 389; *State v. Sutherland*, 30 Iowa 570; *State v. Higdon*, 32 Iowa 262; *State v. Curran*, 51 Iowa 112, 49 N. W. 1006; *People v. Clark*, 33 Mich. 112.

⁵⁷ *Jenkins v. State*, 15 Lea (Tenn.) 674; *Scruggs v. State*, 90 Tenn. 81, 15 S. W. 1074.

⁵⁸ *Brown v. State*, 72 Md. 468, 20 Atl. 186; *People v. Jenness*, 5 Mich. 305; *People v. Carrier*, 46 Mich. 442, 9 N. W. 487.

conduct by some proof that she had previously been unchaste, not only shocks the moral sensibilities, but robs the statute of its real purpose and effectiveness.⁵⁹

§ 2757. Corroborative proof.—In prosecutions for abduction, as in some other crimes, many of the statutes provide that there can be no conviction in the absence of proof corroborating the testimony of the prosecuting witness, the injured person. Under such a statute the question naturally arises as to what is meant by corroborative proof. The general rule is that it should tend to show the material facts necessary to establish the commission of the crime, and the identity of the person committing it. In other words, the corroboration must extend to every material fact essential to constitute the crime. The Court of Appeals of New York stated the rule as follows: “The policy of the statute under consideration would seem to forbid the conviction of a person of the crime of abduction, upon the unsupported evidence of the subject of the crime, and a conviction founded upon the evidence of the abducted female alone as to one of the elements constituting the crime, would be contrary to its implied prohibition. Such evidence must, therefore, tend to prove each of the facts constituting the crime, for otherwise a person might be convicted of an offense as to one of whose elements there existed no proof except that of the alleged abducted female. If the corroborative evidence goes to the support of the alleged purpose alone it is apparent that there is no legal proof of the commission of a crime, and it would be the same if the corroboration was confined to a support of the taking alone, and the proof as to the purpose was uncorroborated. It is indispensable that such corroboration should be furnished by positive and direct evidence, but proof of circumstances legitimately tending to show the existence of the material facts will be sufficient to authorize a conviction. In one form or the other, however, proof must be given, aside from that of the female, tending to establish the commission of a crime, and that it was perpetrated by the person accused before a conviction can be lawfully had.”⁶⁰

⁵⁹ *People v. Cook*, 61 Cal. 478; *People v. Demousset*, 71 Cal. 611, 12 Pac. 788; *People v. Fowler*, 88 Cal. 136, 25 Pac. 1110; *People v. Carrier*, 46 Mich. 442, 9 N. W. 487; *State v. Gibson*, 111 Mo. 92, 19 S. W. 980; *State v. Bobbst*, 131 Mo. 328, 32 S. W. 1149; *Scruggs v. State*, 90 Tenn. 81, 15 S. W. 1074; *South v. State*, 97 Tenn. 496, 37 S. W. 210; *Griffin v. State*, 109 Tenn. 17, 70 S. W. 61.

⁶⁰ *People v. Plath*, 100 N. Y. 590, 3 N. E. 790; *People v. Kearney*, 110

The corroborative testimony required may be supplied by proof of circumstances which are sufficient to raise a presumption of the existence of the essential elements of a crime.⁶¹ It is not essential, however, that the corroborative evidence in itself be sufficient to establish the guilt of the accused.⁶² The rule does not require that the corroboration extend to the testimony of the female on the question of her previous chastity or to the fact that she was unmarried.⁶³

N. Y. 188, 17 N. E. 736; *People v. Page*, 162 N. Y. 272, 56 N. E. 750; *People v. Brandt*, 14 N. Y. St. 419; *People v. Brown*, 71 Hun (N. Y.) 601, 24 N. Y. S. 1111; *State v. Timmens*, 4 Minn. 325; *State v. Brinkhaus*, 34 Minn. 285, 25 N. W. 642; *State v. Wenz*, 41 Minn. 196, 42 N. W. 933; *State v. Keith*, 47 Minn. 559, 50 N. W. 691; 1 Greenleaf Ev., § 381; Russell Crimes 962; Underhill Cr. Ev., § 74.

⁶¹ *Andre v. State*, 5 Iowa 389; *State v. Bell*, 79 Iowa 117, 44 N. W. 244; *State v. Lauderbeck*, 96 Iowa 258, 65 N. W. 158; *State v. Bess*, 109 Iowa 675, 81 N. W. 152.

⁶² *State v. Keith*, 47 Minn. 559, 50 N. W. 691.

⁶³ *Kenyon v. People*, 26 N. Y. 203; *People v. Kearney*, 110 N. Y. 188, 17 N. E. 736.

CHAPTER CXXIX.

ABORTION.

Sec.	Sec.
2758. Definition and meaning.	2765. Proof of nature of means used.
2759. Common-law and statutory offense—Distinction.	2766. Proof of pregnancy.
2760. Proof of intent.	2767. Proof of opportunities and facilities.
2761. Attempt to produce—Intent.	2768. Proof of similar acts.
2762. Proof of motive.	2769. Corroborative proof.
2763. Advising or administering—Proof sufficient.	2770. Dying declarations.
2764. Effect on woman—Consent, etc.	2771. Necessity for producing abortion—Burden of proving negative averment.

- § 2758. **Definition and meaning.**—The crime usually designated by the term abortion in this country is wholly statutory and it is seldom, if ever, designated or described by the use of the word or term “abortion.” The term is simply used as a substitute for the particular or statutory description of a well-known offense. The Supreme Court of Iowa thus speak of it: “By abortion we understand the act of miscarrying or producing young before the natural time, or before the foetus is perfectly formed. And to cause or produce an abortion, is to cause or produce the premature bringing forth of this foetus.”¹ And the Supreme Court of Oregon gives it substantially the same meaning: “The term itself does not import a crime. It simply means, according to Webster, the act of miscarrying, the expulsion of an immature product of conception, miscarriage; the immature product of an untimely birth. And an eminent law writer defines it to be the act of bringing forth what is yet imperfect; and particularly the delivery or expulsion of the human foetus prematurely, or before it is yet capable of sustaining life.”²

¹ *Abrams v. Foshee*, 3 Iowa 274; *Mills v. Commonwealth*, 13 Pa. St. 627, 633; *Wells v. New England*, &c. Ins. Co., 191 Pa. St. 207, 43 Atl. 126.

² *Belt v. Spaulding*, 17 Ore. 130, 20 Pac. 827.

§ 2759. Common law and statutory offense—Distinction.—There is a very clear distinction between the common law and the statutory crime in this country. Under the common law in order to establish the offense the proof must show that the woman was quick or great with child; that is, it must be established that there was foetal life before there could be an indictable offense. Following the common law doctrine and in the absence of statute in some jurisdictions in this country it has been held that an attempt made to cause or produce an abortion, if made with the consent of the woman and where she is not quick with child, was not indictable; as the woman's consent was held to take away the criminal character of the assault.³ The same distinction was recognized in the earlier legislation of this country upon this subject, and is still recognized by the laws of some countries in that the punishment is more severe if committed after the quickening than before. But the statutes generally throughout the United States now provide in substance that: "If any person shall administer to any woman pregnant with a child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of such mother, such person shall, in case the death of such child or mother be thereby produced, be deemed guilty of manslaughter."⁴ And under such statutes it is now the general, if not the universal, rule that it is neither necessary to aver nor to prove that the woman had become quick with child.⁵ Nor is it necessary to show that the child was alive, or that it was born

³ *State v. Cooper*, 22 N. J. L. 52; *State v. Reed*, 45 Ark. 333; *Commonwealth v. Bangs*, 9 Mass. 387, 388; *Commonwealth v. Parker*, 9 Metc. (Mass) 263; *Smith v. State*, 33 Me. 48; *State v. Howard*, 32 Vt. 380; *United States v. Ross*, 1 Gal. (U. S.) 624; *State v. Alcorn*, 7 Idaho 599, 64 Pac. 1014; *People v. Sessions*, 58 Mich. 594, 26 N. W. 291; *State v. Fitzporter*, 93 Mo. 390, 6 S. W. 223; *State v. Emerich*, 13 Mo. App. 492; *State v. Murphy*, 27 N. J. L. 112; *Evans v. People*, 49 N. Y. 85; *State v. Dickinson*, 41 Wis. 299.

⁴ *Belt v. Spaulding*, 17 Ore. 130, 20 Pac. 827; *Butler v. Wood*, 10

How. Pr. (N. Y.) 222; *Eggart v. State*, 40 Fla. 527, 25 So. 144; *Commonwealth v. Taylor*, 132 Mass. 261; *State v. Owen*, 22 Minn. 238; *State v. Morrow*, 40 S. Car. 221, 18 S. E. 853; *Watson v. State*, 9 Tex. Cr. App. 237; *State v. Reed*, 45 Ark. 333; *State v. Lee*, 69 Conn. 186, 37 Atl. 75; *McCaughey v. State*, 156 Ind. 41, 59 N. E. 169; *People v. Abbott*, 116 Mich. 263, 74 N. W. 529; *State v. Dickinson*, 41 Wis. 299.

⁵ *Mills v. Commonwealth*, 13 Pa. St. 627, 631; *State v. Fitzgerald*, 49 Iowa 260; *Commonwealth v. Wood*, 11 Gray (Mass.) 85; *Smith v. State*, 33 Me. 48.

alive, or dead; nor whether the woman died as a result of the operation.⁶ The distinction in this country has been carried to the extent of holding in a slander suit that no crime was imputed by a charge of abortion.⁷

§ 2760. Proof of intent.—As in most crimes the intent constitutes the gist of the action, and to establish a conviction it is essential to prove the intent; or where poison or other substances are administered or means used it must be with the intent to produce miscarriage, and this the proof must clearly establish. A person indicted for administering a drug or doing any other like act with intent to procure an abortion may be convicted where the proof shows either that the attempt was unsuccessful or successful, as the attempt with the intent completes the offense regardless of the result.⁸ On this subject the Supreme Court of Illinois say: "A felonious and malicious intent to cause a miscarriage being charged in the indictment, circumstances sufficient to satisfy the jury of the intent should be shown. A criminal offense consists in a violation of a public law, in the commission of which there must be a union or joint operation of act and intention, or criminal negligence, and the intention is manifested by the circumstances connected with the perpetration of the offense, and the sound mind and discretion of the person accused."⁹ The intent may be established by proof of the directions for the means or instrument.¹⁰ Any declarations or acts either prior or subsequent to the alleged abortion, tending to show the defendant's purpose or intention to produce the abortion, are generally admissible in evidence. And proof of a subsequent attempt by the accused to accomplish the same purpose by different means is admissible to show the intent with which he attempted the first act, as well as to corroborate the evidence of the first attempt.¹¹ So it is competent to prove possession and use of business cards, circulars or advertisements which fairly indicate or

⁶ Commonwealth v. Wood, 11 Gray (Mass.) 85.

⁷ Abram v. Foshee, 3 Iowa 274; Belt v. Spaulding, 17 Ore. 130, 20 Pac. 827.

⁸ People v. Josselyn, 39 Cal. 393; Dougherty v. People, 1 Colo. 514; Slattery v. People, 76 Ill. 217; State v. Drake, 30 N. J. L. 422; Powe v. State, 48 N. J. L. 34, 6 Atl. 662; State v. Clements, 15 Ore. 237, 14

Pac. 410; Commonwealth v. W., 3 Pitts. (Pa.) 462; State v. Moothart, 109 Iowa 130, 80 N. W. 301; State v. Hollenbeck, 36 Iowa 112; State v. Fitzgerald, 49 Iowa 260.

⁹ Slattery v. People, 76 Ill. 217.

¹⁰ State v. Moothart, 109 Iowa 130, 80 N. W. 301; Jones v. State, 70 Md. 326, 17 Atl. 89; Commonwealth v. Holmes, 103 Mass. 440.

¹¹ Dougherty v. People, 1 Colo.

from which it might be understood that the defendant held himself out and was ready to perform the acts of the kind charged.¹²

§ 2761. Attempt to produce—Intent.—The statutes are generally designed to punish any attempt to procure the miscarriage of females with an unlawful intent as much as if the result was actually accomplished. And proof of an attempt to do so with such unlawful intent establishes the crime. This rule has been carried to the extent of holding that where an attempt has been made with such unlawful intent, it is not necessary even that the woman should be pregnant with child; this is wholly immaterial and it is not necessary that any proof be offered on the subject, and the result is the same if the proof wholly fail to establish the fact of pregnancy.¹³ If there exists in the mind a fully formed belief that the woman was pregnant it is sufficient; or if there is a suspicion of pregnancy and the attempt is made the statute is satisfied.¹⁴ It is held in some cases that an attempt to produce an abortion by the use of instruments, when it is not necessary to preserve the life of the woman, is such an unlawful act that the law will infer the criminal intent from the act.¹⁵ The offense is sufficiently established if the proof shows that the attempt was made any time during pregnancy.¹⁶ Where the proof establishes the criminal intent the fact that the substance used would not produce a miscarriage was held to be no defense.¹⁷ Neither is it necessary to show that the attempt had the intended result; nor, it seems, that the thing administered or the in-

514; *Lamb v. State*, 66 Md. 285, 7 Atl. 399. See also, *State v. Alcorn*, 7 Idaho 599, 64 Pac. 1014; *Reg. v. Dale*, 16 Cox Cr. Cas. 703; *Reg. v. Calder*, 1 Cox Cr. Cas. 348; post, § 2768.

¹² *Commonwealth v. Bishop*, 165 Mass. 148, 42 N. E. 560; *Commonwealth v. Barrows*, 176 Mass. 17, 56 N. E. 830; *Weed v. People*, 56 N. Y. 628.

¹³ *Eggart v. State*, 40 Fla. 527, 25 So. 144; *Commonwealth v. Taylor*, 132 Mass. 261; *Scott v. People*, 141 Ill. 195, 30 N. E. 329; *State v. Crews*, 128 N. Car. 581, 38 S. E. 293; *Wilson v. State*, 2 Ohio St.

319; *Reg. v. Goodchild*, 2 Car. & Kir. 293; *Smith v. State*, 33 Me. 48; for a valuable note on the question of "attempt to commit crime," see, *People v. Moran*, 123 N. Y. 254, 25 N. E. 412, 20 Am. St. 741; see, *State v. Springer*, 3 Ohio N. P. 120.

¹⁴ *Powe v. State*, 48 N. J. L. 34, 6 Atl. 662.

¹⁵ *Scott v. People*, 141 Ill. 195, 30 N. E. 329; *State v. Slagle*, 83 N. Car. 630.

¹⁶ *State v. Fitzgerald*, 49 Iowa 260.

¹⁷ *State v. Fitzgerald*, 49 Iowa 260; *State v. Moothart*, 109 Iowa 130, 80 N. W. 301.

strument used should be of such a character as is likely to produce such results.¹⁸ "The guilt of the defendant is not graded by the success or failure of the attempt. It is immaterial whether the foetus is destroyed, or whether it has quickened or not."¹⁹ So an attempt may be proved by showing the administration of drugs.²⁰

§ 2762. Proof of motive.—As crimes are seldom committed without some motive on the part of the accused, it is always regarded as proper and germane to make proof of facts which obviously supply a motive. So on a trial on a charge of either attempting or procuring an abortion it is proper and relevant as tending to show a motive for the crime to prove prior illicit intercourse and that the accused was the father of the child.²¹

§ 2763. Advising or administering—Proof sufficient.—Some of the statutes expressly provide that "whoever unlawfully administers or advises or prescribes for any woman any drug, medicine or other noxious thing with intent to procure her miscarriage will be guilty," etc. Under such a statute it has been held sufficient where the proof showed that the party accused simply advised or prescribed the taking of some medicine or noxious drug unlawfully and with the intent and purpose of producing the miscarriage. It is not necessary to prove that the medicine was taken or the noxious drug or instrument used, as it is immaterial whether the advice was followed or the prescription taken or not.²² Concerning the meaning and use of the word "administered" it has been held that it was "clearly intended to cover the whole ground named, making it an offense to give, furnish, supply, provide with, or cause to be given, supplied, or provided with, or taken, any such

¹⁸ State v. Owen, 22 Minn. 238; State v. Gedicke, 43 N. J. L. 86.

¹⁹ State v. Murphy, 27 N. J. L. 112.

²⁰ State v. Morrow, 40 S. Car. 221, 18 S. E. 853.

²¹ Commonwealth v. W., 3 Pitts. (Pa.) 462; Dunn v. People, 29 N. Y. 523; Crichton v. People, 1 Abb. Dec. (N. Y.) 467; Scott v. People, 141 Ill. 195, 30 N. E. 329; State v. McLeod, 136 Mo. 109, 37 S. W. 828; Commonwealth v. Wood, 77 Mass.

85; State v. Montgomery, 71 Iowa 630, 33 N. W. 143; State v. Moothart, 109 Iowa 130, 80 N. W. 301; People v. McDowell, 63 Mich. 229, 30 N. W. 68.

²² Eggart v. State, 40 Fla. 527, 25 So. 144; State v. Murphy, 27 N. J. L. 112; State v. Hyer, 39 N. J. L. 598; State v. Crews, 128 N. Car. 581, 38 S. E. 293; Robbins v. State, 8 Ohio St. 131; State v. Gedicke, 43 N. J. L. 86; State v. Morrow, 40 S. Car. 221, 18 S. E. 853.

drug, medicine or substance with the intent of either result named in said section. And such word embraced and was intended to embrace every mode of giving, furnishing, supplying, providing with, or causing to be taken any such drug, medicine, or substance."²³ The rule as declared is, that if the accused knew or supposed that the woman was pregnant, and knew the purpose for which she desired the drug, or the noxious substance, and furnished it to her, and thereafter at a time and place when the accused was not present she took such drug or noxious substance, it was administered by the accused, within the meaning of such statute.²⁴ So when the proof showed that advice and directions were sent by mail, for the taking of certain drugs or preparations either prescribed or also sent by mail, it was held sufficient under a charge for administering with the unlawful intent of producing a miscarriage.²⁵ But where the accused is charged with having procured the miscarriage by means of advising certain drugs, it has been held necessary to prove that the advice of the accused was followed and the drug or noxious substance actually taken. This rule, however, does not apply on a charge of an attempt to commit the crime.²⁶

§ 2764. **Effect on the woman—Consent, etc.**—The offense under the statutes of the several states does not necessarily include an assault. The act is made criminal without regard to the consent of the person upon whom it is performed; a defendant may be convicted though the act was performed with the consent of the woman.²⁷ But under the common law it was not indictable where the woman consented if she was not quick with child.²⁸ While the consent of the woman does not affect the criminality of the accused, a woman may be guilty of a conspiracy with others to procure a miscarriage on her own person.²⁹ But a statute prohibiting any person from administer-

²³ *McCaughey v. State*, 156 Ind. 41, 59 N. E. 169.

²⁴ *McCaughey v. State*, 156 Ind. 41, 59 N. E. 169; *Jones v. State*, 70 Md. 326, 17 Atl. 89; *Reg. v. Wilson*, *Dears & B.* 127.

²⁵ *State v. Moothart*, 109 Iowa 130, 80 N. W. 301; *Jones v. State*, 70 Md. 326, 17 Atl. 89.

²⁶ *People v. Phelps*, 133 N. Y. 267, 30 N. E. 1012; *Lamb v. State*, 67 Md. 524, 10 Atl. 208.

²⁷ *Commonwealth v. Snow*, 116 Mass. 47; *Commonwealth v. Wood*, 11 Gray (Mass.) 85, see, *Hatchard v. State*, 79 Wis. 357, 48 N. W. 380.

²⁸ *Commonwealth v. Parker*, 9 Metc. (Mass.) 263.

²⁹ *Solander v. People*, 2 Colo. 48; *Frazer v. People*, 54 Barb. (N. Y.) 306; *People v. Meyers*, 5 N. Y. Cr. 120.

ing drugs to a pregnant woman was held not to apply to the woman herself.³⁰ And under some statutes a woman is not indictable for procuring an abortion upon herself.³¹

§ 2765. Proof of nature of means used.—The proof should show something of the nature or kind of the instruments, drugs or other things or articles used for the purpose of producing the abortion. It has also been held that the proof should show that the means or instruments implied were calculated to or would produce the intended result.³² Some cases hold that it is not necessary to show the character of the instrument used.³³ But under rules given in another section it is immaterial whether or not the intended effect resulted. And it has been held that instructing, directing, soliciting or inducing the woman to take violent physical exercise, where a motive was shown to exist, for the purpose and with the intention of thereby producing the abortion, was sufficient.³⁴ It is not necessary to prove that the drug or liquid administered was poisonous; or even that it should be capable of producing the miscarriage charged.³⁵ It is sufficient if the proof shows that the liquid or substance administered was noxious or unwholesome and that it might probably occasion injury or derangement to the system of a woman who was pregnant with child; and this may be inferred from the effects.³⁶

§ 2766. Proof of pregnancy.—The rule established by one class of cases is that in prosecutions under such sections of the statute where the charge is an attempt to produce a miscarriage or abortion that it is not necessary either to aver in the indictment or prove on the trial of the case that the woman was in fact pregnant. Such cases evidently proceed on the theory that the crime consists in the attempt to do the act, and that the act itself is complete, regardless of the actual condition of the woman or the result of the effort.³⁷ Another

³⁰ *Smith v. Gaffard*, 31 Ala. 45.

³¹ *Hatfield v. Gano*, 15 Iowa 177.

³² *Williams v. State*, (Tex.) 19 S. W. 897; *Hunter v. State*, 38 Tex. Cr. App. 61, 41 S. W. 602.

³³ *Commonwealth v. Snow*, 116 Mass. 47; *State v. Lilly*, 47 W. Va. 496, 30 S. E. 837.

³⁴ *Commonwealth v. W.*, 3 Pitts. (Pa.) 462; *Lamb v. State*, 67 Md. 524, 10 Atl. 208.

³⁵ *State v. Owens*, 22 Minn. 238.

³⁶ *Dougherty v. People*, 1 Colo. 514; *State v. Vawter*, 7 Blackf. (Ind.) 592; *State v. Gedlicke*, 43 N. J. L. 86; *Eggart v. State*, 40 Fla. 527, 25 So. 144; *State v. Crews*, 128 N. Car. 581, 38 S. E. 293; *State v. Van Houten*, 37 Mo. 357; *Watson v. State*, 9 Tex. App. 237; *Rex v. Phillips*, 3 Campb. 73.

³⁷ *Commonwealth v. Taylor*, 132

class of cases establishes the rule that under certain peculiar charges in the indictment or under the peculiar language of the statute, it is not only necessary to prove that the woman was pregnant but that she was quick with child; that is, that the child was alive. And this rule has been carried to the extent of holding that under certain averments in the indictment the pregnancy of the woman must be established beyond a reasonable doubt.³⁸

§ 2767. Proof of opportunities and facilities.—As tending to establish both the crime and the intent with which it was committed, it is proper to introduce any proper evidence which will prove or tend to prove either the opportunity to commit the crime or the facilities with which it might have been committed. Thus, it has been held competent and proper to introduce in evidence or to exhibit to the jury surgical instruments adapted to use in producing abortion, found in the possession of the accused. So it has been held competent for medical experts to testify that in their opinion the instruments found and exhibited were adapted to producing abortion.³⁹ And it has been held competent to introduce letters or written statements or arrangements by which the accused and the person upon whom the abortion was alleged to have been produced were to meet at a certain place; or evidence that they did meet and were known to be at a place peculiarly adapted to the commission of such crime; such evidence being admissible on the theory of affording an opportunity to commit the crime charged.⁴⁰

§ 2768. Proof of similar acts.—The general rule as to proof of similar acts for the purpose of showing guilt or guilty knowledge

Mass. 261; Commonwealth v. Folansbee, 155 Mass. 274, 29 N. E. 471; Commonwealth v. Tibbetts, 157 Mass. 519, 32 N. E. 910; Reg. v. Goodchild, 2 Car. & Kir. 293.

³⁸ State v. Stewart, 52 Iowa 284, 3 N. W. 99; State v. Alcorn, 7 Idaho 599, 64 Pac. 1014; Mitchell v. Commonwealth, 78 Ky. 204; State v. Smith, 32 Me. 369; People v. McDowell, 63 Mich. 229, 30 N. W. 68; People v. Aiken, 66 Mich. 460, 33 N. W. 821; State v. Cooper, 22 N. J. L. 52; Evans v. People, 49 N. Y. 86; Wilson v. State, 2 Ohio St. 319;

Mills v. Commonwealth, 13 Pa. St. 627, 631.

³⁹ Commonwealth v. Brown, 121 Mass. 69; Commonwealth v. Drake, 124 Mass. 21; Commonwealth v. Blair, 126 Mass. 40; Commonwealth v. Tibbetts, 157 Mass. 519, 32 N. E. 910; People v. Vedder, 34 Hun (N. Y.) 280; People v. McGonegal, 136 N. Y. 62, 32 N. E. 616; Weed v. People, 3 Thomp. & C. (N. Y.) 50; Moore v. State, 37 Tex. Cr. App. 552, 40 S. W. 287; People v. Sessions, 58 Mich. 594, 26 N. W. 291.

⁴⁰ Hays v. State, 40 Md. 633.

applies in this class of cases, and where the charge was that the accused had unlawfully used certain instruments with intent to cause the miscarriage of the woman, it was held proper to show that in addition to using the instruments described, the accused had also administered other unlawful treatment for the same purpose; it was also held proper and competent to prove that he had used the same treatment on the same woman on other occasions than that named in the indictment and recently prior to the same time charged, for the purpose of showing both his intent and his knowledge or belief of the pregnant condition of the woman.⁴¹

§ 2769. Corroborative proof.—Under some statutes there can be no conviction unless the woman on whom the operation was alleged to have been produced is corroborated by other testimony or circumstances. The rule in this, as in other such cases, is that she must be corroborated on every essential element of the crime. And as the intent is not only an essential element but the gist of the offense, she must be corroborated in this particular. As stated by one court, “she must also have been corroborated by circumstances, or otherwise, in at least some portion of her testimony which imputes to the defendant the commission of the crime alleged, to wit, in the use of an instrument with intent to produce abortion.”⁴² Under a statute which provided that a conviction should not be had on the evidence of an accomplice in the absence of corroborative proof, it was held in a case where the husband occupied the position as accomplice in causing the death of his wife by consenting to an abortion, that the dying declarations of the wife supporting the statements of the husband were sufficient corroborative proof to sustain a conviction.⁴³ But where the record does not affirmatively show that there was no corroborative evidence, and where it does not purport to contain all the evidence upon that point, the presumption of law is that there was sufficient competent evidence to support the verdict.⁴⁴

§ 2770. Dying declarations.—The general rule as to the admissibility of dying declarations does not apply wholly in cases of abor-

⁴¹ Commonwealth v. Corkin, 136 Mass. 429; People v. Sessions, 58 Mich. 594, 26 N. W. 291; Scott v. People, 141 Ill. 195, 30 N. E. 329; Maine v. People, 9 Hun (N. Y.) 113; King v. State, (Tex.) 34 S. W. 282; see, § 2760.

⁴² People v. Josselyn, 39 Cal. 393.

⁴³ State v. Pearce, 56 Minn. 226, 57 N. W. 652.

⁴⁴ State v. Owens, 22 Minn. 238.

tion. Generally speaking and according to many cases, in this class, such evidence is not admissible.⁴⁵ The rule excluding such declarations is based on the fact that death is not an essential ingredient of the crime. And where the death of the woman is not such essential ingredient of the crime such declarations are not admissible. The statutory crime of abortion in many states, as at common law, is complete without the death of the woman. In such cases the proof of death where it ensues is not so much to determine the character of the crime as to determine the penalty to be inflicted on the criminal.⁴⁶ But where the death of the woman is an essential element in the offense as charged, her dying declarations may be introduced in evidence.⁴⁷ So, it may be given as a general rule that in prosecution for homicide produced or caused by an abortion, the dying declarations of the deceased are admissible in evidence.⁴⁸

§ 2771. Necessity for producing abortion—Burden of proving negative averment.—The statutes creating this offense generally contain an exception that it is not a crime if done in order to save human life. It has been held that this exception in the statute must be negatived in the indictment and it must be proved on the trial and that the burden of proving such a negative averment is upon the state. But it has been held that this rule does not require proof beyond a reasonable doubt, but it is sufficient if such negative averment is made out by a *prima facie* case. The rule on this subject was stated by the Connecticut court as follows: "The want of necessity was an element of the crime as charged in the information, as much so as the act or

⁴⁵ *Montgomery v. State*, 80 Ind. 338; *Wooten v. Wilkins*, 39 Ga. 223; *Rex v. Lloyd*, 4 Car. & P. 233; *Reg. v. Hind*, 8 Cox Cr. Cas. 300; *Reg. v. Edwards*, 12 Cox Cr. Cas. 230.

⁴⁶ *Montgomery v. State*, 80 Ind. 338; *Worthington v. State*, 92 Md. 222, 48 Atl. 355; *Commonwealth v. Homer*, 153 Mass. 343, 26 N. E. 872; *People v. Davis*, 56 N. Y. 95; *State v. Harper*, 35 Ohio St. 78; *Ralling v. Commonwealth*, 110 Pa. St. 100, 1 Atl. 314; *State v. Pearce*, 56 Minn. 226, 57 N. W. 652.

⁴⁷ *Montgomery v. State*, 80 Ind. 338; ante, Vol. I, § 353.

⁴⁸ *State v. Lodge*, 9 Houst. (Del.)

542, 33 Atl. 312; *State v. Alcorn*, 7 Idaho 599, 64 Pac. 1014; *State v. Leeper*, 70 Iowa 748, 30 N. W. 501; *State v. Baldwin*, 79 Iowa 714, 45 N. W. 297; *People v. Commonwealth*, 87 Ky. 488, 9 S. W. 509; *Worthington v. State*, 92 Md. 222, 48 Atl. 355; *Commonwealth v. Thompson*, 159 Mass. 56, 33 N. E. 1111; *People v. Olmstead*, 30 Mich. 431; *State v. Pearce*, 56 Minn. 226, 57 N. W. 652; *Donnelly v. State*, 26 N. J. L. 601; *State v. Meyer*, 65 N. J. L. 237, 47 Atl. 486; *Maine v. People*, 9 Hun (N. Y.) 113; *State v. Dickinson*, 41 Wis. 299.

intent charged; and the burden of proving the former as well as the latter elements rests upon the state for the same reason, namely, because under our law it is the duty of the state to prove guilt and not that of the accused to prove innocence. . . . The truth of this negative averment as part of the state's case must in some way be made *prima facie* to appear at the trial; but it need not necessarily be so made to appear by evidence. For instance, where there is a presumption of law in favor of the truth and averment of this kind, the state may in the first instance, and until evidence to the contrary is introduced by the defendant, rest upon the presumption, just as it might upon evidence sufficient to make out a *prima facie* case. In such a case the burden of proving the averment still rests upon the state, but by the presumption it is relieved for the time being from introducing evidence in support of the averment, because the presumption under such circumstances stands in the place of evidence."⁴⁹ Where the exception in the statute further provides that the act must be done on the advice of a physician, the rule is established in some cases that while it is necessary for the state to produce some evidence that the abortion was unnecessary to save the life of the mother, the burden of showing that it was advised by a physician to be necessary for that purpose, is upon the defendant.⁵⁰ So, it is held that this absence of necessity may be proved by circumstantial evidence sufficient to demonstrate that the instrument or means was not employed because of necessity.⁵¹

⁴⁹ *State v. Lee*, 69 Conn. 186, 37 Atl. 75; *Beasley v. People*, 89 Ill. 571; *State v. Aiken*, 109 Iowa 643, 80 N. W. 1073; *State v. Watson*, 30 Kans. 281; *Commonwealth v. Hart*, 11 Cush. (Mass.) 130; *State v. Hirsch*, 45 Mo. 429; *State v. Meek*, 70 Mo. 355; *State v. Fitzporter*, 93 Mo. 390, 6 S. W. 223; *State v. Schuerman*, 70 Mo. App. 518; *Bradford v. People*, 20 Hun (N. Y.) 309; *People v. McGonegal*, 10 N. Y. Cr. 141, 17 N. Y. S. 147; *Moody v. State*,

17 Ohio St. 110; *State v. Barker*, 18 Vt. 195; *Hatchard v. State*, 79 Wis. 357, 48 N. W. 380; but see, *State v. Clements*, 15 Ore. 237, 14 Pac. 410.

⁵⁰ *State v. Meek*, 70 Mo. 355; *Moody v. State*, 17 Ohio St. 110.

⁵¹ *Bradford v. People*, 20 Hun (N. Y.) 309; *People v. McGonegal*, 10 N. Y. Cr. 141, 17 N. Y. S. 147; *Hatchard v. State*, 79 Wis. 357, 48 N. W. 380.

CHAPTER CXXX.

ACCESSORIES.

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§ 2772. Definition.—The definition of an accessory as given by Mr. Blackstone is generally conceded to be correct and is almost universally followed. In defining it he says: "An accessory is he who is not the chief actor in the offense nor present at its performance, but is in some way concerned therein, either before or after the affair."¹ On this subject Mr. Wharton says: "To constitute such an accessory, it is necessary that he should have been absent at the time when the felony was committed; if he was either actually or constructively present, he is, as has been seen, a principal."² Whatever the resemblance between principal and accessories, it is the well established rule, where not changed by statute, that a person cannot be indicted as a principal and convicted on proof showing him to be only an accessory.³

¹ 4 Blackstone Comm. 35; United States v. Hartwell, 3 Cliff. (U. S.) 221.

² 1 Wharton Cr. Law, § 225; 3 Greenleaf Ev. 42.

³ 1 Wharton Cr. Law, § 114, 208; Hughes v. State, 12 Ala. 458; Able v. Commonwealth, 5 Bush (Ky.)

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§ 2773. **Principals and accessories.**—Some writers make practically no distinction between principals in the second degree and accessories. If any distinction is made it seems to be in the cases where the principal in the second degree was physically present; whereas it is sufficient if an accessory is only constructively present. Mr. Wharton says: "Principals in the second degree are those who are present, aiding and abetting at the commission of the fact. To constitute principals in the second degree, there must be, in the first place, a participation in the act committed; and in the second place, presence either actual or constructive, at the time of its commission."⁴ The rule has been extended to the point of holding that it is not necessary that the evidence should show any direct communication between the accessory and the principal.⁵

§ 2774. **Accessory before the fact.**—Accessories in crime are divided into two classes: (1) Accessory before the fact; (2) accessory after the fact. An accessory before the fact is one "who, being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime. Herein absence is necessary to make him an accessory."⁶ Another distinction is made thus: "To be a principal in either degree, there must be an actual or constructive presence at the commission of the offense. Advising its perpetration makes the advisor an accessory before the fact; receiving the stolen property, knowing it to be stolen makes the receiver accessory after the fact."⁷ Mr. Wharton says: "An accessory before the fact is one who, though absent at the time of the commission of the felony, doth yet procure, counsel, command or abet another to commit such felony."⁸ As defined by Mr. Bishop: "An accessory before the fact is a person whose will contributed to a felony committed by another as principal, while himself too far away to aid in the felonious act." Mr. Bishop concedes that the distinction between

⁴ 1 Wharton Cr. Law, § 116; 1 Wharton Cr. Law, § 211; 3 Greenleaf Ev., § 40; but see, *State v. Ricker*, 29 Me. 84.

⁵ *Commonwealth v. Smith*, 11 Allen (Mass.) 243; *Rex v. Cooper*, 5 Car. & P. 535.

⁶ 4 Blackstone Comm. 35.

⁷ *Able v. Commonwealth*, 5 Bush (Ky.) 698; *Connaughty v. State*, 1 Wis. 159.

⁸ 1 Wharton Cr. Law, § 134; 1 Hale P. C. 615; *Able v. Commonwealth*, 5 Bush (Ky.) 698; *United States v. Hartwell*, 3 Cliff. (U. S.) 221; *Komrs v. People*, 31 Colo. 212, 73 Pac. 25; *Albritton v. State*, 32 Fla. 358, 13 So. 955; *State v. Beebe*, 17 Minn. 241; *Pearce v. Territory*, 11 Okla. 438, 68 Pac. 504; *State v. Maxent*, 10 La. Ann. 743.

the principal and an accessory before the fact is purely technical, and has no existence in natural reason or the ordinary doctrines of the law.⁹ By statute in many of the states all distinctions between principals and accessories have been abolished, and all persons participating in the commission of a felony, whether they are present, actively engaged in the act, or though absent, aid and abet its commission; and they may be indicted, tried and punished as principals.¹⁰

§ 2775. Accessory after the fact.—There is a clear distinction between an accessory before the fact and an accessory after the fact. So the distinction between an accessory after the fact and a principal is clear. And an accessory after the fact is not to be charged simply as one receiving stolen goods. As defined in some statutes and by some courts an accessory after the fact “is a person who after full knowledge that a crime has been committed, conceals it from the magistrate and harbors, assists, or protects the person charged with or convicted of the crime.” And as further stated by the same court: “In this classification of the offense, both at common law and under our statutes, the law contemplates some assistance or act done to the felon himself, and is distinct from receiving stolen goods from the felon, except such taking is for the purpose of facilitating his escape from justice, or attended with some benefit.” The difference, therefore, between an accessory after the fact and a person receiving stolen goods is that the former renders some aid, assistance or protection to the principal while the latter does not.¹¹

⁹ 1 Bishop Cr. Law (New), § 673; *Hately v. State*, 15 Ga. 346; *Kinnebrew v. State*, 80 Ga. 232, 5 S. E. 56; *Riggins v. State*, 116 Ga. 592, 42 S. E. 707; *Pearce v. Territory*, 11 Okla. 438, 68 Pac. 504; *State v. Snell*, 46 Wis. 524, 1 N. W. 225; *Spear v. Hiles*, 67 Wis. 361, 30 N. W. 511; *Meister v. People*, 31 Mich. 99; *Unger v. State*, 42 Miss. 642; *People v. Katz*, 23 How. Pr. (N. Y.) 93; *People v. Wixon*, 5 Park. Cr. Cas. (N. Y.) 119; *McCarney v. People*, 83 N. Y. 408; *Phillips v. Tucker*, 14 N. Y. St. 120; *Usselton v. People*, 149 Ill. 612, 36 N. E. 952; *State v. Farr*, 33 Iowa 553; *State v. Poynier*,

36 La. Ann. 572; *State v. Hamilton*, 13 Nev. 386; *Warden v. State*, 24 Ohio St. 143; *Cook v. State*, 14 Tex. App. 96; *Ogle v. State*, 16 Tex. App. 361; *State v. Prater*, 52 W. Va. 132, 43 S. E. 230; *Hicks v. United States*, 150 U. S. 442, 14 Sup. Ct. 144.

¹⁰ *Griffith v. State*, 90 Ala. 583, 8 So. 670; *State v. Tally*, 102 Ala. 25, 15 So. 722; *State v. Cassady*, 12 Kans. 550; *Spies v. People*, 122 Ill. 1, 12 N. E. 865.

¹¹ 4 Blackstone Comm. 37; 1 Hale P. C. 618; 1 Chitty 264; *Loyd v. State*, 42 Ga. 221; *State v. Cassady*, 12 Kans. 550; *Able v. Commonwealth*, 5 Bush (Ky.) 698; *Tully v.*

§ 2776. Accessory during the fact.—Some statutes define what is called an accessory during the fact. This is defined to be “a person who stands by without interfering or giving such help as may be in his power to prevent a criminal offense from being committed.” Under such a statute the indictment must state and the proof must show that the accused had power to prevent the commission of the particular crime; they should show what it was in his power to do without placing himself in peril; or what act he failed to do which he might have safely done. Under such circumstances the law does not require a person to hazard his personal safety to prevent the commission of a crime. He is not required to expose himself to danger.¹²

§ 2777. Proof of principal's guilt.—It is a primary and fundamental rule that under the common law or the statutes for punishing accessories, it is necessary that the guilt of the principal felon should be shown before an accused could be convicted as an accessory. For the same reason it was therefore necessary that the indictment against an accessory should be sufficient as to make it a good indictment against the principal.¹³ The rule as stated by some courts is that the conviction of the principal is essential to the guilt of an accessory at common law.¹⁴ Some statutes permit the indictment and conviction of the accessory where it appears that the principals could not be captured or prosecuted and convicted. In such cases before an accessory can be convicted the statute must show that a crime had been committed and that the principal could not be arrested. Before an accessory can be convicted under such stat-

Commonwealth, 11 Bush (Ky.) 154; Harris v. State, 7 Lea (Tenn.) 124; 3 Greenleaf Ev., §§ 47-50.

¹² Farrell v. People, 8 Colo. App. 524, 46 Pac. 841; State v. Hamilton, 13 Nev. 386.

¹³ Tully v. Commonwealth, 11 Bush (Ky.) 154; Stoops v. Commonwealth, 7 S. & R. (Pa.) 491; Buck v. Commonwealth, 107 Pa. St. 486; Armstrong v. State, 33 Tex. Cr. App. 417, 26 S. W. 829; Hatchett v. Commonwealth, 75 Va. 925; Ogden v. State, 12 Wis. 532, 592; Baxter v. People, 7 Ill. 578; Ray v. State, 13 Neb. 55, 13 N. W. 2; Ter-

ritory v. Dwenger, 2 N. Mex. 73; Levy v. People, 80 N. Y. 327; State v. Duncan, 6 Ired. L. (N. Car.) 98; Self v. State, 6 Baxt. (Tenn.) 244; McCarty v. State, 44 Ind. 214; Simms v. State, 10 Tex. App. 131; Armstrong v. State, 33 Tex. Cr. App. 417, 26 S. W. 829; but see contra: State v. Mosley, 31 Kans. 355, 2 Pac. 782; State v. Bogue, 52 Kans. 79, 34 Pac. 410; State v. Patterson, 52 Kans. 335, 34 Pac. 784.

¹⁴ Bowen, Ex parte, 25 Fla. 214, 6 So. 65; Bowen v. State, 25 Fla. 645, 6 So. 459.

utes it must be shown generally that the principal, whether taken or not or whether known or unknown, was guilty.¹⁵ But some statutes permit the arrest, prosecution and conviction of the accessory without reference to the question of the conviction of the principal; yet such statutes adhere to the rule of requiring the guilt of the principal to be proved.¹⁶ But the rule is that "any acts and conduct of the principal tending to show his own guilt is evidence of such guilt as against the accessory."¹⁷ The accessory may be tried before the conviction of a principal, but as above stated the proof must establish the guilt of the principal, and any evidence competent to show the guilt of the principal is admissible for that purpose on the trial of the accessory.¹⁸ And it has been held that the proof must establish the guilt of the principal as well as that of the accessory beyond a reasonable doubt.¹⁹ The rule seems to be well established that the accessory may on his own behalf controvert the propriety or the correctness of the principal's conviction by the testimony of witnesses.²⁰

§ 2778. Proof of principal's guilt—Record of conviction.—The rule as stated in the preceding section requires that the guilt of the principal be established. Any legitimate evidence which does this or which tends to establish his guilt is competent and admissible. And for the purpose of establishing the guilt of the principal it is now the general rule that a record of his conviction and sentence is admissible in evidence for this purpose.²¹ However, the rule is that such records of conviction are only *prima facie* evidence of the guilt of the principal. And the record of the conviction of the principal on a plea of guilty is not conclusive for any purpose connected with the

¹⁵ *Edwards v. State*, 80 Ga. 127, 4 S. E. 268.

¹⁶ *Vaughan v. State*, 57 Ark. 1, 20 S. W. 588.

¹⁷ *Gill v. State*, 59 Ark. 422, 27 S. W. 598; *State v. Rand*, 33 N. H. 216; *Self v. State*, 6 Baxt. (Tenn.) 244; *Simms v. State*, 10 Tex. App. 131.

¹⁸ *Buck v. Commonwealth*, 107 Pa. St. 486; *Vaughan v. State*, 57 Ark. 1, 20 S. W. 588.

¹⁹ *Poston v. State*, 12 Tex. App. 408.

²⁰ *State v. Duncan*, 6 Ired. L. (N.

Car.) 98; *McCarty v. State*, 44 Ind. 214.

²¹ *Anderson v. State*, 63 Ga. 675; *Coxwell v. State*, 66 Ga. 310; *Groves v. State*, 76 Ga. 808; *Stripland v. State*, 114 Ga. 843, 40 S. E. 993; *Keithler v. State*, 10 Sm. & M. (Miss.) 192; *Levy v. People*, 80 N. Y. 327; *State v. Mosley*, 31 Kans. 355, 2 Pac. 782; *State v. Chittem*, 2 Dev. L. (N. Car.) 49; *West v. State*, 27 Tex. App. 472, 11 S. W. 482; *United States v. Hartwell*, 3 Cliff. (U. S.) 221; *People v. Gray*, 25 Wend. (N. Y.) 465.

trial of the accessory, if he choose to controvert it.²² But the prosecution is not limited to the introduction of a record but may establish the guilt of the principal by any other competent evidence.²³ So, a record of the conviction of a principal on a plea of guilty can only be *prima facie* proof of his guilt as against the accessory.²⁴

§ 2779. **Effect of acquittal.**—In the jurisdictions which hold that the principal's guilt must be established in order to support a conviction of the accessory, it is also the rule that proof of the principal's acquittal operates as a complete defense on behalf of the accessory and he must be discharged.²⁵ This was carried to the extent of holding that where a verdict of guilty was returned against the accessory but before sentence was pronounced the principal was tried and acquitted, that on the production of the record of such acquittal of the principal the accessory should be discharged.²⁶ So where a principal was indicted and convicted and the conviction of the accessory followed, but the principal thereafter appealed his case which was reversed, it was held that the accessory should be discharged.²⁷ But in the jurisdictions where the distinction between principal and accessory has been abolished, the rule as to the conviction or acquittal of the principal no longer applies.²⁸ If the record shows an acquittal of the principal then the accessory must be discharged, and where the accessory was first tried and a verdict of guilty returned but before sentence was pronounced the principal was tried and ac-

²² *Anderson v. State*, 63 Ga. 675; *State v. Mosley*, 31 Kans. 355, 2 Pac. 782; *Levy v. People*, 80 N. Y. 327; *People v. Buckland*, 13 Wend. (N. Y.) 592; *United States v. Hartwell*, 3 Cliff. (U. S.) 221; *Studstill v. State*, 7 Ga. 2; *Commonwealth v. Knapp*, 10 Pick. (Mass.) 477; *State v. Gleim*, 17 Mont. 17, 41 Pac. 998.

²³ *Levy v. People*, 80 N. Y. 327.

²⁴ *Anderson v. State*, 63 Ga. 675; *Groves v. State*, 76 Ga. 808; *Baxter v. People*, 7 Ill. 578; *Buck v. Commonwealth*, 107 Pa. St. 486.

²⁵ *State v. Ludwick*, Phil. (N. Car.) 401; *State v. Jones*, 101 N. Car. 719, 8 S. E. 147; *United States v. Crane*, 4 McLean (U. S.) 317.

²⁶ *Bowen v. State*, 25 Fla. 645, 6

So. 459; *McCarty v. State*, 44 Ind. 214.

²⁷ *Ray v. State*, 13 Neb. 55, 13 N. W. 2.

²⁸ *People v. Bearss*, 10 Cal. 68; *People v. Newberry*, 20 Cal. 439; *State v. Mosley*, 31 Kans. 355, 2 Pac. 782; *State v. Bogue*, 52 Kans. 79, 34 Pac. 410; *State v. Patterson*, 52 Kans. 335, 34 Pac. 784; *People v. Kief*, 126 N. Y. 661, 27 N. E. 556; *Noland v. State*, 19 Ohio 131; *Evans v. State*, 24 Ohio St. 458; *State v. Cassady*, 12 Kans. 550; *State v. Jones*, 7 Nev. 408; *Spies v. People*, 122 Ill. 1, 12 N. E. 865; *Reg. v. Hughes*, Bell Cr. Cas. 242; *Reg. v. Pulham*, 9 Car. & P. 280.

quitted, it was held that on the production of the record showing such acquittal of the principal the accessory should be discharged.²⁹

§ 2780. Proof of principal's guilt—Confession.—It has already been shown in preceding sections that on the trial of an accessory the guilt of the principal must be proved, and that this might be done by any competent evidence. The courts are not agreed, however, on the question of the admissibility of the admissions or confessions made by the principal. The rule established by the decided weight of authorities, and certainly by the better reasoning, is that the confession of the principal is admissible: (1) When the confession is such that it would be competent evidence if the principal himself were on trial; (2) that such confession is admissible only for the purpose of making the prima facie proof of the principal's guilt, and is not otherwise evidence against the accessory.³⁰ And this rule has been carried to the extent of holding that a confession is admissible where it goes not only to the guilt of the principal, but tends to prove the guilt of the accused.³¹ But it seems that proof of such confession cannot be made, at least as evidence against the accused, until a conspiracy is established.³²

§ 2781. Accessory before the fact—Proof of guilt.—Many statutes have abolished the distinction between principals and accessories before the fact and punish all as principals. Yet the rule is maintained that unless the proof would be sufficient to convict the accused as an accessory, according to the distinction at common law, he could not be found guilty under such statutes.³³ But where a statute provides for punishing an accessory as a principal the accessory must be indicted as a principal; otherwise there can be no con-

²⁹ *Bowen v. State*, 25 Fla. 645, 6 So. 459; *McCarty v. State*, 44 Ind. 214.

³⁰ *Smith v. State*, 46 Ga. 298; *Groves v. State*, 76 Ga. 808; *Lynes v. State*, 36 Miss. 617; *Self v. State*, 6 Baxt. (Tenn.) 244; *Morrow v. State*, 14 Lea (Tenn.) 475; *Simms v. State*, 10 Tex. App. 131; *Bluman v. State*, 33 Tex. Cr. App. 43, 21 S. W. 1027; *Hartwell v. United States*, 3 Cliff. (U. S.) 221; but see, contra: *Vaughan v. State*, 57 Ark. 1, 20 S.

W. 588; *Gill v. State*, 59 Ark. 422, 27 S. W. 598; *State v. Rand*, 33 N. H. 216; *Ogden v. State*, 12 Wis. 532, 592; *Rex v. Turner*, 1 Moody Cr. Cas. 374.

³¹ *Territory v. Dwenger*, 2 N. Mex. 73.

³² *Loggins v. State*, 8 Tex. App. 434; *Arnold v. State*, 9 Tex. App. 435; *Crook v. State*, 27 Tex. App. 198, 11 S. W. 444.

³³ *State v. Farr*, 33 Iowa 553.

viction.⁸⁴ No absolute rule can be given as to the nature or sufficiency of the proof to convict an accessory. It is never necessary that the evidence of an unlawful combination to perpetrate a particular offense should be direct and positive. Such combination or common intent may be proved from all the facts and circumstances connected with the transaction.⁸⁵ And as stated by another court where the accused was charged as an accessory in a homicide case, "nor is it necessary that the acts or words of the accessory should directly incite or expressly command the principal to commit the homicide; it is enough if it appears that the acts or words of the accessory were intended to secure the unlawful killing of the deceased, and that they effected that result."⁸⁶

§ 2782. Proof of advising or participating.—In order to establish the guilt of a person charged as an accessory the proof must bring him clearly within the meaning of the term according to the definitions already given. In other words it must be shown that he either counseled, commanded or procured another to commit the crime, he himself not being actively or constructively present at the time it was committed. But it is not essential that the proof show that any specific mode of committing the offense should be counseled or commanded; nor is it necessary to prove that the act was committed in the particular manner counseled or instigated. In the commission of the act itself the principal may vary the mode or circumstances of its perpetration and yet the accessory be guilty; or the criminal liability may exist though the proof fails to establish the particular manner, time or place counseled, commanded or instigated by the accused.⁸⁷ But it is necessary that the proof show a criminal intent on the part of the accessory; or, as otherwise stated, the proof must show that the accessory intended the criminal effect.⁸⁸ So it is held that the instigation or encouragement given

⁸⁴ *Baxter v. People*, 3 Gilm. (Ill.) 368; *Coates v. People*, 72 Ill. 303; *Usselton v. People*, 149 Ill. 612, 36 N. E. 952.

⁸⁵ *State v. Lucas*, 57 Iowa 501, 10 N. W. 868.

⁸⁶ *Sage v. State*, 127 Ind. 15, 26 N. E. 667.

⁸⁷ *Hughes v. State*, 75 Ala. 31;

Griffith v. State, 90 Ala. 583, 8 So. 812; *Ferguson v. State*, 134 Ala. 63, 32 So. 760.

⁸⁸ *Hicks v. United States*, 150 U. S. 140, 14 Sup. Ct. 144; *Spies v. People*, 122 Ill. 1, 12 N. E. 865; *Commonwealth v. Campbell*, 7 Allen (Mass.) 541; *State v. Hickam*, 95 Mo. 322, 8 S. W. 252.

by the accessory may be by words, signs or acts.³⁹ But the proof must show that the advice or command of the accessory was given and that it was actually communicated to the principal.⁴⁰

§ 2783. Crime by principal must be in purview of accessory's advice.—The rule that the proof need not show any specific mode of committing the offense nor that the act was committed in the particular manner counseled or commanded and that the principal may vary the mode or circumstances of its perpetration is clearly within the line of the authorities. Yet the rule is that the crime committed by the principal must come within the purview of the advice, counsel or instigation of the accessory. In other words the accessory is not criminally liable where the principal commits a collateral or an independent crime. But the accessory is guilty if in the perpetration of the particular offense counseled, advised and instigated by him the principal commits a crime which is incident to or connected with the offense attempted to be perpetrated or is one of the probable consequences of the offense intended. This rule is best appreciated and understood by the illustrative cases. Thus where the accused procured another as principal to commit a robbery, and either in the commission of the robbery or immediately thereafter such principal murdered the person robbed in order to conceal the crime, it was held that the accused was guilty as an accessory to the murder.⁴¹ This rule was illustrated by the Supreme Court of Ohio thus: "If several are associated together to commit a robbery, and one of them, while all are engaged in the common design, intentionally kills the person they are attempting to rob, in furtherance of the common purpose, all are equally guilty, though the others had not previously consented to the killing, where such killing was done in the execution of the common purpose, and was a natural and probable result of the attempt to rob."⁴²

³⁹ *Brennan v. People*, 15 Ill. 511; *Mo.* 135, 43 S. W. 637; *Watts v. Spies v. People*, 122 Ill. 1, 12 N. E. State, 5 W. Va. 532; *Saunders' Case*, Plow. 473.

12 N. E. 510.

⁴⁰ *Spies v. People*, 122 Ill. 1, 12 N. E. 865.

⁴¹ *State v. Davis*, 87 N. Car. 514; *People v. Keefer*, 65 Cal. 232, 3 Pac. 818; *State v. Lucas*, 55 Iowa 321, 7 N. W. 583; *State v. May*, 142

⁴² *Stephens v. State*, 42 Ohio St. 150; *State v. Nash*, 7 Iowa 347; *State v. Shelledy*, 8 Iowa 477; *State v. Lucas*, 55 Iowa 321, 7 N. W. 583; *State v. Lucas*, 57 Iowa 501, 10 N. W. 868; *People v. Pool*, 27 Cal. 572; *People v. Vasquez*, 49 Cal. 560;

§ 2784. Accessory after the fact—Proof sufficient to constitute. In order to convict an accused as being an accessory after the fact the proof must bring him within the definition as previously given. To be sufficient the evidence must establish: (1) The fact of a felony having been committed; (2) knowledge of the commission of the felony; (3) the receiving, relieving, comforting or assisting the felon. It is clear that knowledge of the commission of the crime of a felony must be brought home to the accused, but whether or not he had such knowledge is a question of fact for the jury. On the question of receiving, relieving or assisting the felon the rule has been stated as follows: "That any assistance given to one known to be a felon, in order to hinder his apprehension, trial or punishment, is sufficient to make a man accessory after the fact; as that he concealed himself in the house, or shut the door against his pursuers, until he should have an opportunity to escape, or supplied him with money, a horse or other necessities, in order to enable him to escape; or that the principal was in prison, and the jailor was bribed to let him escape; or conveyed instruments to him and enabled him to break prison and escape. This and such like assistance to one known to be a felon would constitute a man accessory after the fact."⁴³ On the trial of the accessory any evidence is proper which goes to prove the guilt of the principal or the accessory.⁴⁴ An inferior court

People v. Keefer, 65 Cal. 232, 3 Pac. 818; *Stipp v. State*, 11 Ind. 62; *United States v. Ross*, 1 Gall. (U. S.) 624; *Wynn v. State*, 63 Miss. 260; *People v. Knapp*, 26 Mich. 112; *Watts v. State*, 5 W. Va. 532; 1 *Bishop Cr. Law*, § 636; 1 *Wharton Cr. Law*, § 229.

⁴³ *Wren v. Commonwealth*, 26 Gratt. (Va.) 952; *Loyd v. State*, 42 Ga. 221; *State v. Hudson*, 50 Iowa 157; *State v. Empey*, 79 Iowa 460, 44 N. W. 707; *State v. Douglass*, 3 Ohio Dec. 540; *State v. Davis*, 14 R. I. 281; *Street v. State*, 39 Tex. Cr. App. 134, 45 S. W. 577; *Tully v. Commonwealth*, 13 Bush (Ky.) 142; *Harrel v. State*, 39 Miss. 702; *Poston v. State*, 12 Tex. App. 408; *Blakeley v. State*, 24 Tex. App. 616, 7 S. W. 233; *People v. Shepardson*,

48 Cal. 189; *Reg. v. Chapple*, 9 Car. & P. 355; *Rex v. Greenacre*, 8 Car. & P. 35; 3 *Greenleaf Ev.*, § 47; 1 *Archibold Cr. Proc. (Pl. & Ev.)* 17; *Melton v. State*, 43 Ark. 367; *Carroll v. State*, 45 Ark. 539; *People v. Garnett*, 129 Cal. 364, 61 Pac. 1114; *Hearn v. State*, 43 Fla. 151, 29 So. 433; *White v. People*, 81 Ill. 333; *State v. Stanley*, 48 Iowa 221; *State v. Fry*, 40 Kans. 311, 19 Pac. 742; *State v. Hann*, 40 N. J. L. 228; *People v. Dunn*, 7 N. Y. Cr. 173, 6 N. Y. S. 805; *Noftsinger v. State*, 7 Tex. App. 301; *Chitister v. State*, 33 Tex. Cr. App. 635, 28 S. W. 683; *Gatlin v. State*, 40 Tex. Cr. App. 116, 49 S. W. 87.

⁴⁴ *Territory v. Dwenger*, 2 N. Mex. 73; *Simms v. State*, 10 Tex. App. 131.

of New York has given the following as a test: "To constitute an accessory, it is not sufficient to assist the person to elude punishment, because failing to prosecute or preventing the attendance of witnesses would produce that result. But to constitute the offense, one must help the principal to elude, or evade, capture."⁴⁵

§ 2785. Accessory and accomplice—Distinction.—The terms accessory and accomplice are sometimes used interchangeably and one term is often used as synonymous with the other. But the majority of the cases makes a very clear distinction between them. It is true that an accessory before the fact may always be said in a sense to be an accomplice; but an accomplice is not always an accessory. The definition given by one court is as follows: "An accomplice is defined to be a person, who knowingly, voluntarily and with common intent with the principal offender, unites in the commission of a crime."⁴⁶ According to some decisions and some law writers an accomplice is a principal in the first degree and may be indicted and punished in the same manner as the principal.⁴⁷ Other courts say that an accomplice is "an associate in crime; a partner or partaker in guilt."⁴⁸ The term is frequently used to include all participants in a crime whether as principals or accessories.⁴⁹ But other courts and writers define accomplice as one who in any manner participates in the criminality of an act, whether as a principal in the first or second degree, or as an accessory before or after the fact.⁵⁰ According to

⁴⁵ *People v. Dunn*, 7 N. Y. Cr. 173, 6 N. Y. S. 805.

⁴⁶ *Clapp v. State*, 94 Tenn. 186, 30 S. W. 214; *State v. Roberts*, 15 Ore. 187, 13 Pac. 896; *State v. Light*, 17 Ore. 358, 21 Pac. 132; *State v. Carr*, 28 Ore. 389, 42 Pac. 215; *State v. Kuhlman*, 152 Mo. 102, 53 S. W. 416; *People v. Bolanger*, 71 Cal. 17, 11 Pac. 799; 1 Wharton Cr. Ev., § 440.

⁴⁷ *State v. Umble*, 115 Mo. 452; 22 S. W. 378; *State v. Kuhlman*, 152 Mo. 102, 53 S. W. 416.

⁴⁸ *Davidson v. State*, 33 Ala. 350; *State v. Light*, 17 Ore. 358, 21 Pac. 132.

⁴⁹ *Davidson v. State*, 33 Ala. 350; *Polk v. State*, 36 Ark. 117; *Huds-*

peth v. State, 50 Ark. 544, 9 S. W. 1; *People v. Kraker*, 72 Cal. 459, 14 Pac. 196; *Cross v. People*, 47 Ill. 152; *Johnson v. State*, 2 Ind. 652; *State v. Henderson*, 84 Iowa 61, 50 N. W. 758; *State v. Quinlan*, 40 Minn. 55, 41 N. W. 299; *Lindsay v. People*, 63 N. Y. 143, 153; *State v. Odell*, 8 Ore. 30, 33; *Harris v. State*, 7 Lea (Tenn.) 124; *Barrara v. State*, 42 Tex. 260, 263; *House v. State*, 16 Tex. App. 25; *Zollicoffer v. State*, 16 Tex. App. 312; *Harrison v. State*, 17 Tex. App. 442.

⁵⁰ *Russell Cr. Pr.* 26; *Polk v. State*, 36 Ark. 117; *Cross v. People*, 47 Ill. 152; *Miller v. Commonwealth*, 78 Ky. 15.

the rule established in Texas an accomplice is virtually an accessory before the fact.⁵¹ An accomplice is one who is associated with others in the commission of a crime, all being principals, although the term is sometimes used to include all the participants in a crime, whether as principals or accessories.⁵² It has been expressly held that an accessory after the fact was not an accomplice within the meaning of the law.⁵³

§ 2786. Evidence of accomplice—Corroboration.—The statutes in almost all the states now require that a person accused of a crime cannot be convicted on the evidence of the accomplice alone. The rule as generally stated is that to authorize the conviction of the accused on the testimony of an accomplice, such testimony must be corroborated by other evidence tending to connect the accused with the commission of the crime.⁵⁴ But it is held that the corroborative

⁵¹ *Cook v. State*, 14 Tex. App. 96; *Ogle v. State*, 16 Tex. App. 361; *Smith v. State*, 21 Tex. App. 107, 17 S. W. 552; *West v. State*, 28 Tex. App. 1, 11 S. W. 635; *Rix v. State*, 33 Tex. Cr. App. 353; 26 S. W. 505; *Dawson v. State*, 38 Tex. Cr. App. 50, 41 S. W. 599; *Bean v. State*, 17 Tex. Cr. App. 60; *Mitchell v. State*, 44 Tex. Cr. App. 228, 70 S. W. 208.

⁵² *Harris v. State*, 7 Lea (Tenn.) 124.

⁵³ *State v. Umble*, 115 Mo. 452, 22 S. W. 378; *State v. Kuhlman*, 152 Mo. 102, 53 S. W. 416; *People v. Chadwick*, 7 Utah 134, 25 Pac. 737; *Lowery v. State*, 72 Ga. 649; *Allen v. State*, 74 Ga. 769.

⁵⁴ *Lumpkin v. State*, 68 Ala. 56; *Burney v. State*, 87 Ala. 80, 6 So. 391; *Malachi v. State*, 89 Ala. 134, 8 So. 104; *Territory v. Neligh*, (Ariz.) 10 Pac. 367; *Fort v. State*, 52 Ark. 180, 11 S. W. 959; *People v. Ames*, 39 Cal. 403; *People v. Melvane*, 39 Cal. 614; *People v. Clough*, 73 Cal. 348, 15 Pac. 5; *People v. Smith*, 98 Cal. 218, 33 Pac. 58; *People v. Larson*, (Cal.) 34 Pac. 514; *People v. Strybe*, (Cal.) 36 Pac. 3;

Childers v. State, 52 Ga. 105; *Middleton v. State*, 52 Ga. 527; *Chapman v. State*, 112 Ga. 56, 37 S. E. 102; *Johnson v. State*, 65 Ind. 269; *Archer v. State*, 106 Ind. 426, 7 N. E. 225; *State v. Schlagel*, 19 Iowa 169; *State v. Dietz*, 67 Iowa 220, 25 N. W. 141; *State v. Van Winkle*, 80 Iowa 15, 45 N. W. 388; *Bowling v. Commonwealth*, 79 Ky. 604; *Craft v. Commonwealth*, 80 Ky. 349; *Smith v. Commonwealth*, 13 Ky. L. R. 369, 17 S. W. 182; *State v. Brin*, 30 Minn. 522, 16 N. W. 406; *State v. Clements*, 82 Minn. 434, 85 N. W. 229; *People v. O'Neil*, 109 N. Y. 251, 16 N. E. 68; *People v. Ogle*, 104 N. Y. 511, 11 N. E. 53; *People v. Williams*, 29 Hun (N. Y.) 520, 522; *People v. Plath*, 100 N. Y. 590, 3 N. E. 790; *People v. Butler*, 62 App. Div. (N. Y.) 508, 71 N. Y. S. 129; *People v. Bosworth*, 64 Hun (N. Y.) 72, 19 N. Y. S. 114; *State v. Hicks*, 6 S. Dak. 325, 60 N. W. 66; *State v. Kent*, (S. Dak.) 62 N. W. 631; *State v. Jarvis*, 18 Ore. 360, 23 Pac. 251; *Cox v. Commonwealth*, 125 Pa. St. 94, 17 Atl. 227; *Lopez v. State*, 34 Tex. 133; *Bybee v. State*, 36 Tex. 366;

proof need not of itself be sufficiently strong as to warrant a conviction.⁵⁵ It has also been held that the corroborating testimony need not be true beyond a reasonable doubt.⁵⁶ It has been held to be sufficient if the accomplice is corroborated as to such facts as go to the identity of the accused in connection with the crime; in other words, the rule does not require more than that the accomplice be corroborated as to the facts which tend to connect him with the crime.⁵⁷ The rule requiring the corroborating evidence to connect the accused with the commission of the crime is not sufficiently complied with where the accomplice is corroborated as to time, place and circumstances of the transaction, but when the evidence in no way connects the accused therewith.⁵⁸ So it has been held to be sufficient if the accomplice is corroborated by other evidence as to any material point.⁵⁹ And it has been regarded as sufficient where the evidence of the accomplice is corroborated by proof of a confession by the accused.⁶⁰ However, this requirement is not carried to the extent of holding that the evidence must absolutely connect the defendant with the crime; but it has been held to be sufficient if it fairly tends to connect him with the perpetration of the offense, or that he was implicated in it.⁶¹ And it is held to be the rule that the testimony of one

Barrara v. State, 42 Tex. 260; *Wright v. State*, 43 Tex. 170; *Lockhart v. State*, 29 Tex. App. 35, 13 S. W. 1012; *Sanders v. State*, (Tex.) 29 S. W. 777; *McNeally v. State*, 5 Wyo. 59, 36 Pac. 824; *United States v. Kershaw*, 5 Utah 618, 19 Pac. 194; *State v. Koplan*, 167 Mo. 298, 66 S. W. 967; *State v. Stevenson*, 26 Mont. 332, 67 Pac. 1001; an interesting but not important history of the progress and development of the law of the corroboration of an accomplice is found in *Wigmore Ev.*, § 2056.

⁵⁵ *Smith v. State*, 59 Ala. 104; *Lumpkin v. State*, 68 Ala. 56; *People v. Bosworth*, 64 Hun (N. Y.) 72, 19 N. Y. S. 114.

⁵⁶ *Vaughan v. State*, 58 Ark. 353, 24 S. W. 885.

⁵⁷ *Vaughan v. State*, 58 Ark. 353,

24 S. W. 885; *People v. Courtney*, 26 Hun (N. Y.) 589.

⁵⁸ *Childers v. State*, 52 Ga. 106; *State v. Hicks*, 6 S. Dak. 325, 60 N. W. 66.

⁵⁹ *People v. Ardell*, 135 Cal. 19, 66 Pac. 970; *State v. Jones*, 115 Iowa 113, 88 N. W. 196; *State v. Schlagel*, 19 Iowa 169; *People v. Hooghkerk*, 96 N. Y. 149; *People v. Bosworth*, 64 Hun (N. Y.) 72, 19 N. Y. S. 114.

⁶⁰ *Patterson v. Commonwealth*, 86 Ky. 313, 5 S. W. 387; *Snoddy v. State*, 75 Ala. 23; *Schaefer v. State*, 93 Ga. 177, 18 S. E. 552.

⁶¹ *People v. Everhardt*, 104 N. Y. 591, 11 N. E. 62; *People v. Elliott*, 106 N. Y. 292, 12 N. E. 602; *People v. Elliott*, 5 N. Y. Cr. 204; *People v. Bosworth*, 64 Hun (N. Y.) 72, 19 N. Y. S. 114; *Commonwealth v. Holmes*, 127 Mass. 424; *State v. McLain*, 159 Mo. 340, 60 S. W. 736.

accomplice cannot support that of another.⁶² The rule that the evidence of one accomplice cannot corroborate that of another does not apply where such corroborative evidence is by an accomplice in a separate and distinct crime or in a different crime of the same kind.⁶³ So it has been held to be corroborative evidence for the consideration of the jury where the accused failed to contradict the accomplice, where such contradictory evidence was within the power of the accused.⁶⁴

§ 2787. Evidence of accessory—Corroboration.—The question has arisen as to whether or not an accessory after the fact is an accomplice with the principal. And as a resultant of this the further question has arisen as to whether or not the rule requiring proof corroborating the evidence of an accomplice applies to an accessory after the fact. It is held in some jurisdictions under their statutes that an accessory after the fact cannot be indicted and tried as a principal and therefore the accessory after the fact is not an accomplice.⁶⁵ It is quite generally held that an accessory after the fact is not an accomplice under certain statutes and within the meaning of the rule that requires the corroboration of the testimony of an accomplice.⁶⁶ So the rule requiring corroboration does not apply to a feigned accomplice.⁶⁷

⁶² *Johnson v. State*, 4 Greene Mass. 343; *State v. Kuhlman*, 152 (Iowa) 65; *State v. Williamson*, 42 Mo. 100, 53 S. W. 416.
Conn. 261; *Porter v. Commonwealth*, 22 Ky. L. R. 1657, 61 S. W. 16; *Powers v. Commonwealth*, 22 Ky. L. R. 1807, 61 S. W. 735.

⁶³ *People v. Sternberg*, 111 Cal. 3, 43 Pac. 198.

⁶⁴ *People v. Dyle*, 21 N. Y. 578; *Gordon v. People*, 33 N. Y. 501; *Ormsby v. People*, 53 N. Y. 472; *People v. Ryland*, 97 N. Y. 126; *Whitney v. Ticonderoga*, 127 N. Y. 40, 27 N. E. 403.

⁶⁵ *Lowery v. State*, 72 Ga. 549; *Allen v. State*, 74 Ga. 769; *Commonwealth v. Wood*, 11 Gray (Mass.) 85; *Commonwealth v. Boynton*, 116 Mass. 343; *State v. Kuhlman*, 152 Mo. 100, 53 S. W. 416.
⁶⁶ *Lowery v. State*, 72 Ga. 649; *Allen v. State*, 74 Ga. 769; *People v. Barric*, 49 Cal. 342; *State v. Hayden*, 45 Iowa 11; *State v. Baden*, 37 Minn. 212, 34 N. W. 24; *State v. Quinlan*, 40 Minn. 55, 41 N. W. 299; *State v. Umble*, 115 Mo. 452, 22 S. W. 378; *State v. Kuhlman*, 152 Mo. 100, 53 S. W. 416; *Harris v. State*, 7 Lea (Tenn.) 124; *People v. Chadwick*, 7 Utah 134, 25 Pac. 737.
⁶⁷ *People v. Farrell*, 30 Cal. 316; *People v. Bolanger*, 71 Cal. 17, 11 Pac. 799; *Commonwealth v. Willard*, 22 Pick. (Mass.) 476; *Commonwealth v. Downing*, 4 Gray (Mass.) 29; 1 Greenleaf Ev., § 382.

CHAPTER CXXXI.

ADULTERY.

Sec.	Sec.
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2789. Scope of chapter.	2798. Marriage—Proof of necessary.
2790. Nature of proof.	2799. Marriage—Method of proving.
2791. Proof by circumstances.	2800. Marriage—Proof by records.
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2793. Inferred from circumstances —No proof of specific act.	2802. Proof of marriage—Admissions, etc.
2794. Inference from particular circumstances.	2803. Proof of marriage—Prima facie case.
2795. Cohabitation or living in adultery.	2804. Invalid marriage as a defense—Burden of proof.
2796. Proof not limited as to time or place.	2805. Invalid divorce—No defense.

§ 2788. **Generally.**—The chapter on this subject can only be general. An exhaustive treatment of the proof required to establish the crime of adultery or fornication is scarcely practicable. The crime is not only governed but is also usually defined by the local statutes of the several states, and these are by no means uniform. The simple act of adultery or fornication was not punishable as a crime by the common law. But this rule of the common law has been changed in many of the states of the United States. Under some of the local statutes any act of illicit sexual intercourse, whether adultery or fornication, is punishable as a misdemeanor or a crime. By the statutes of other states the adultery or fornication must be in connection with a living together or a cohabitation by the parties. On account of the difference in the statutes of the various states there is found a great contrariety as well as apparent conflict in the adjudicated cases of the several states. Hence in order to reconcile the decisions it is necessary to examine the special statutes under which they are made.

§ 2789. **Scope of chapter.**—The fact or act of illicit intercourse is required to be proved in a variety of cases, such as divorce, seduction, criminal seduction, abduction, adultery and perhaps some

others. The scope and purpose of this chapter is to give the rules of proof in cases only, except incidentally, where adultery and fornication are made crimes or where living together or cohabitation in a state of adultery or fornication is made a criminal offense. The rules of proof in these various cases are essentially different. Generally in most of the cases enumerated the fact may be established by a mere preponderance of the evidence; and in some even *prima facie* proof is held sufficient. But under the criminal codes the general rule of proof of crimes prevails and the fact must be established beyond a reasonable doubt whether the proof be by direct evidence, admissions or circumstances.¹

§ 2790. **Nature of proof.**—It is commonly accorded that the act of adultery or fornication is one of the most difficult of proof in the calendar of crimes. But few persons are so depraved and so hardened to all sense of shame that they commit the offense except in the most secret and clandestine manner. Hence the difficulty of making the required proof is recognized and compensated by the law. This compensation consists in the fact that the law does not require actual proof of the overt act; it may be proved by circumstances. This subject has been fully and aptly treated in an English case as follows: "It is a fundamental rule, that it is not necessary to prove the direct fact of adultery, because, if it were otherwise, there is not one case in a hundred in which that proof would be attainable; it is very rarely indeed that the parties are surprised in the direct fact of adultery. In every case almost the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion; and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights. What the circumstances are which lead to such a conclusion cannot be laid down universally, though many of them, of a more obvious nature and of more frequent occurrence, are to be found in the ancient books; at the same time it is impossible to indicate them universally; because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances apparently slight and delicate in themselves, but which may have most important bearings in decisions upon the particular case. The only general rule that can be laid

¹ *Gore v. State*, 58 Ala. 391; *State* 787; *Crane v. People*, 168 Ill. 395, v. *Schweitzer*, 57 Conn. 532, 18 Atl. 48 N. E. 54.

down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion; for it is not to lead a rash and intemperate judgment, moving upon appearances that are equally capable of two interpretations,—neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man. The facts are not of a technical nature; they are facts determinable upon common grounds of reason; and courts of justice would wander very much from their proper office of giving protection to the rights of mankind, if they let themselves loose to subtleties, and remote and artificial reasoning upon such subjects. Upon such subjects the rational and the legal interpretation must be the same.”²

§ 2791. Proof by circumstances.—No general rule can be stated either as to the sufficiency of the proof or as to the nature of the circumstances required to establish the fact. Each particular case must be governed by its own peculiar circumstances. As to the sufficiency of such circumstances Mr. Greenleaf states the rule as follows: “It will be sufficient, if the circumstances are such as to lead the court, traveling with every necessary caution to this conclusion, which it has often drawn between persons living in the same house, though not seen in the same bed or in any equivocal situation. It will neither be misled by equivocal appearances on the one hand, nor, on the other, will it suffer the object of the law to be eluded by any combination of parties to keep without the reach of direct and positive proof. And in examining the proofs, they will not be taken isolated and detached; but the whole will be taken together. Yet, in order to infer adultery from general conduct, it seems necessary that a *suspicio violenta* should be created. But the adulterous disposition of the parties being once established, the crime may be inferred from their afterward being discovered together in a bed-chamber, under circumstances authorizing such inference.”³

² *Loveden v. Loveden*, 2 Hagg. Car.) 23; *State v. Eliason*, 91 N. Con. 1; *Matchin v. Matchin*, 6 Pa. Car. 564; *Commonwealth v. Clifford*, 145 Mass. 97, 13 N. E. 345; *State v.*

³ 2 *Greenleaf Ev.*, § 41; *Powell v. Bridgman*, 49 Vt. 202; *Inskeep v. Powell*, 80 Ala. 595, 1 So. 549; *Commonwealth v. Bowers*, 121 Mass. 45; *Inskeep*, 5 Iowa 204; *State v. Snover*, 64 N. J. L. 65, 44 Atl. 850; *Commonwealth v. Gray*, 129 Mass. State v. Way, 5 Neb. 283; *Matchin* 474; *State v. Poteet*, 8 Ired. L. (N. v. *Matchin*, 6 Pa. St. 332; *Names v.*

§ 2792. **Inferred from circumstances.**—As intimated or stated in a former section the fact of adultery may be established by circumstances. So the law now very generally recognizes that the fact of adultery may be inferred from circumstances. The requirement is that the circumstances shall be sufficient to raise such a presumption of guilt as would leave no reasonable doubt in the minds of the jury as to the guilt of the accused. This rule was very aptly stated by the Supreme Court of Indiana thus: "From the nature of the case, it will rarely happen that direct and positive evidence of acts of illicit intercourse can be obtained. Accordingly, the unlawful and lascivious commerce may be inferred from circumstances proven, which raise such a presumption of guilt, as leaves no reasonable doubt, in that regard, in the minds of the jury."⁴ The rule as ap-

Names; 67 Iowa 383, 25 N. W. 671; Culver v. Culver, 38 N. J. Eq. 163; Day v. Day, 4 N. J. Eq. 444; Berckmans v. Berckmans, 16 N. J. Eq. 122; Hurtzig v. Hurtzig, 44 N. J. Eq. 329, 15 Atl. 537; Richardson v. State, 34 Tex. 142; Price v. State, 18 Tex. App. 474; State v. Bridgman, 49 Vt. 202; State v. Potter, 52 Vt. 33. See also, Vol. I, § 176.

⁴Richardson v. Richardson, 4 Port. (Ala.) 467; State v. Crowley, 13 Ala. 172; Gore v. State, 58 Ala. 391; Love v. State, 124 Ala. 82, 27 So. 217; State v. Schweitzer, 57 Conn. 532, 18 Atl. 787; Weaver v. State, 74 Ga. 376; Eldridge v. State, 97 Ga. 192; Starke v. State, 97 Ga. 193; Searls v. People, 13 Ill. 597; Dally v. Dally, 64 Ill. 329; Bast v. Bast, 82 Ill. 584; Cooke v. Cooke, 152 Ill. 286, 38 N. E. 1027; Stiles v. Stiles, 167 Ill. 576, 47 N. E. 867; Crane v. People, 168 Ill. 395, 48 N. E. 54; Jackson v. State, 116 Ind. 464, 19 N. E. 330; State v. Kirkpatrick, 63 Iowa 554, 19 N. W. 660; State v. Briggs, 68 Iowa 416, 27 N. W. 358; State v. Henderson, 84 Iowa 161, 50 N. W. 758; State v. Ean, 90 Iowa 534, 58 N. W. 898; Aitchison v. Aitchison, 99 Iowa 96,

68 N. W. 573; Carlisle v. Carlisle, 99 Iowa 247, 68 N. W. 681; State v. Wiltsey, 103 Iowa 54, 72 N. W. 415; State v. Witham, 72 Me. 531; Thayer v. Thayer, 101 Mass. 111; Commonwealth v. Bowers, 121 Mass. 45, 47; Commonwealth v. Gray, 129 Mass. 474; Commonwealth v. Clifford, 145 Mass. 97, 13 N. E. 345; People v. Davis, 52 Mich. 569, 18 N. W. 362; People v. Girdler, 65 Mich. 68, 31 N. W. 624; People v. Montague, 71 Mich. 447, 39 N. W. 585; People v. Fowler, 104 Mich. 449, 62 N. W. 572; Carotti v. State, 42 Miss. 334, 97 Am. Dec. 465; State v. Clawson, 30 Mo. App. 139; State v. Coffee, 39 Mo. App. 56; State v. Way, 5 Neb. 283; State v. Bailey, 36 Neb. 808, 55 N. W. 241; State v. Winkley, 14 N. H. 480; State v. Marvin, 35 N. H. 22; State v. Snover, 64 N. J. L. 65, 44 Atl. 850; Hurtzig v. Hurtzig, 44 N. J. Eq. 329, 15 Atl. 537; Van Epps v. Van Epps, 6 Barb. (N. Y.) 320; State v. Poteet, 8 Ired. L. (N. Car.) 23; State v. Waller, 80 N. Car. 401; State v. Kemp, 87 N. Car. 538; State v. Pippin, 88 N. Car. 646; State v. Ellason, 91 N. Car. 564; State v. Guest, 100 N. Car. 410, 6 S. E. 253;

plied by one court in a civil action was thus stated: "In order to prove adultery by circumstantial evidence two points are to be ascertained and established; the opportunity for the crime, and the will to commit it. Where both are established, the court will infer the guilt."⁵

§ 2793. Inferred from circumstances—No proof of specific act. By the rule stated in a former section proof of a single act, or even several acts of adultery, without living together, would not be sufficient to establish the criminal offense; nor would the mere proof of living together without the commission of adultery be sufficient; but the proof of living together with proof of other circumstances, the condition and situation of the parties might be sufficient to justify or support a verdict of guilty in the absence of any proof of the specific act. Of this the Illinois court said: "It may, of course, possibly be true that no act of adultery ever occurred between the plaintiffs in error, as they testified; but when men and women assume those relations, commit those indiscretions and surround themselves with the circumstances which, by the common consent of mankind, based upon human experience and observation, lead to but one conclusion,—that of the existence of an adulterous relation between them,—they can have no reason to expect that courts of justice will put a different interpretation upon their conduct, and by some process of artificial reasoning refuse belief when all the world would be convinced."⁶

§ 2794. Inference from particular circumstances.—While the crime of adultery is usually established by circumstantial evidence or inferred from a chain of circumstances proved, yet there are certain circumstances from the proof of which inferences naturally arise which are received and accepted by courts with the credit of prac-

State v. Austin, 108 N. Car. 780, 13 S. E. 219; State v. Stubbs, 108 N. Car. 744, 13 S. E. 90; Commonwealth v. Mosier, 135 Pa. St. 221, 19 Atl. 943; Commonwealth v. Bell, 166 Pa. St. 405, 31 Atl. 123; Kahn v. State, (Tex.) 38 S. W. 989; Stewart v. State, (Tex.) 43 S. W. 979; Bradshaw v. State, (Tex.) 61 S. W. 713; Lenert v. State, (Tex.) 63 S.

W. 563; Swancoat v. State, 4 Tex. App. 105; State v. Bridgman, 49 Vt. 202, 24 Am. 124; State v. Colby, 51 Vt. 291; Baker v. United States, 1 Pinn. (Wis.) 641.

⁵ Berckmans v. Berckmans, 16 N. J. Eq. 122.

⁶ Crane v. People, 168 Ill. 395, 48 N. E. 54; Carotti v. State, 42 Miss. 334, 97 Am. Dec. 465.

tical certainty. Of these, one is, that where it is shown that a man and woman, not husband and wife, occupied the same room with but a single bed for a night or for any considerable length of time, it has almost invariably been held to be sufficient to warrant the inference of the act of adultery; and proof of the continued occupancy under the same circumstances is held sufficient to establish adulterous cohabitation.⁷ Another circumstance from which it is held that guilt may be inferred is where the proof shows that a married man associated with a known prostitute.⁸ Or when a married man is seen to enter a house of prostitution and is known to be in a room with a common prostitute sufficient time to commit the act, adultery will be inferred.⁹ But even such a visit is subject to explanation and the incriminating inference may be fully rebutted.¹⁰

§ 2795. Cohabitation or living in adultery.—Under the statutes of many states in order to constitute the crime of adultery there must be proof of cohabitation. Indeed some of the statutes make the crime consist in living together in a state of adultery. Under such a statute to warrant a judgment of conviction the proof must show that the persons dwelt or lived together. The offense was described by an early Illinois case as follows: “In order to constitute this crime the parties must dwell together openly and notoriously, upon terms as if the conjugal relation existed between them, in other words, they must cohabit together. There must be an habitual illicit intercourse between them. The object of the statute was to prohibit the public scandal and disgrace of the living together of persons of opposite sexes notoriously in illicit intimacy, which outrages public decency, having a demoralizing and debasing influence upon society. They may, indeed, live together in the same family; but if apparently chaste, regularly occupying separate apartments, a single instance

⁷ *Daily v. Daily*, 64 Ill. 329; *Names v. Names*, 67 Iowa 383, 25 N. W. 671; *Commonwealth v. Clifford*, 145 Mass. 97, 13 N. E. 345; *Culver v. Culver*, 38 N. J. Eq. 163; *State v. Brooks*, 108 N. Car. 780; *Commonwealth v. Mosier*, 135 Pa. St. 221, 19 Atl. 943; *Richardson v. State*, 34 Tex. 142; *Parks v. State*, 4 Tex. App. 134.

⁸ *Cloccl v. Cloccl*, 26 Eng. L. & Eq. 604.

⁹ *Astley v. Astley*, 1 Hagg. Con. 714; *Richardson v. Richardson*, 4 Port. (Ala.) 467; *Evans v. Evans*, 41 Cal. 103; *Commonwealth v. Gray*, 129 Mass. 474; *Van Epps v. Van Epps*, 6 Barb. (N. Y.) 320; *Langstaff v. Langstaff*, *Wright* (Ohio) 148.

¹⁰ *Latham v. Latham*, 30 Gratt. (Va.) 307; 2 Bishop Mar. Div. & Sep., § 1384.

of illicit intercourse surely would not constitute the crime of living together in an open state of fornication.”¹¹ The Supreme Court of Nebraska speak of this crime as follows: “That the defendant did wantonly cohabit with the woman in a state of adultery. To cohabit, according to the sense in which the word is used in the statute means dwelling together as husband and wife, or in sexual intercourse, and comprises a continued period of time. Hence the offense is not the single act of adultery; it is cohabiting in a state of adultery; and it may be a week, a month, a year or longer, but, still it is one offense only.”¹² So where the statute makes criminal the living “in a state of open and notorious cohabitation and adultery,” it has been held that the charge was not sufficiently sustained by proof of a single act or occasional acts; but that in order to sustain a conviction proof of notoriety was essential to establishing the offense.¹³

§ 2796. Proof not limited as to time or place.—The ordinary rule of the proof being limited to the time and place as charged in the indictment does not apply generally to cases of persons charged with living together in a state of adultery. It seems to be the very generally accepted rule that proof of acts of familiarity and conduct between parties is not limited to the time of the return of the indictment nor even to the jurisdiction of the court in which the charge was made. This rule is more fully stated as follows: “Whatever may have been said to the contrary in certain cases, it must now be regarded as settled law that in such cases prior acts of improper familiarity, or of adultery, between parties, whether they occurred in the same jurisdiction or not, and even subsequent acts which tend to show a continued illicit relation between them, may be proved in explanation of, or as characterizing, the acts and conduct of the par-

¹¹ Crane v. People, 168 Ill. 395, 48 N. E. 54; Miner v. People, 58 Ill. 59; State v. Chandler, 96 Ind. 591; Jackson v. State, 116 Ind. 464, 19 N. E. 330; Van Dolsen v. State, 1 Ind. App. 108, 27 N. E. 440; State v. Smith, 18 Ind. App. 179, 47 N. E. 685; Carotti v. State, 42 Miss. 334, 97 Am. Dec. 465; Smith v. State, 39 Ala. 554; Quartemas v. State, 48 Ala. 269; Smith v. State, 86 Ala. 57, 6 So. 71.

¹² State v. Way, 5 Neb. 283.

¹³ People v. Gates, 46 Cal. 52; White v. White, 82 Cal. 427, 23 Pac. 276; Wright v. State, 5 Blackf. (Ind.) 358; State v. Gartrell, 14 Ind. 280; Gaylor v. McHenry, 15 Ind. 383; State v. Stephens, 63 Ind. 542; State v. Coffee, 39 Mo. App. 56; Morrill v. State, 5 Tex. App. 447; Miner v. People, 58 Ill. 59; State v. Marvin, 12 Iowa 499; Commonwealth v. Calef, 10 Mass. 153; State v. Jolly, 3 Dev. & B. (N. Car.) 110.

ties complained of as constituting the particular offense charged.”¹⁴ Evidence of alleged conduct prior to the time the parties lived in the jurisdiction in which the indictment was returned, as well as proof of conduct since the return of the indictment has been held competent for the purpose of giving color or characterizing the conduct of the parties while within the jurisdiction and prior to the return of the indictment.¹⁵

§ 2797. Rule as to single act.—Under the statutes which make adultery or fornication in themselves a crime, proof of a single act is sufficient to establish the guilt of the accused. But under statutes which make cohabitation, or living together in a state of adultery, a crime, proof of a single act alone is not sufficient to establish guilt, although proof of a single act in connection with other things might be sufficient. It is obvious, however, that such statutes do not intend to punish either a single act, or occasional acts, of criminal intercourse. The punishment is directed against the condition of cohabitation or the living together in such a state, as distinguished from a single act or occasional acts. Proof of this state or condition is sufficient regardless of the time for which it has existed. Of this rule the Alabama court has said: “It is a state or condition of cohabitation, as distinguished from a single or occasional acts that it was intended to reach, designed by the parties as continuous, so long as they chose. This state or condition may well be assumed by them in a single day, if such is their purpose, as any other state or condition may be so assumed. If for a single day they live together in adultery, intending a continuance of the connection, the offense is complete, though it may be interrupted or broken off by a prosecution, or the fear of prosecution, or from any other cause. The

¹⁴ Crane v. People, 168 Ill. 395, 48 N. E. 54; Thayer v. Thayer, 101 Mass. 111; Pond v. Pond, 132 Mass. 219; State v. Way, 5 Neb. 283; Commonwealth v. Nichols, 114 Mass. 285; Lawson v. State, 20 Ala. 65; People v. Jenness, 5 Mich. 305; People v. Clark, 33 Mich. 112; People v. Davis, 52 Mich. 569, 18 N. W. 362; People v. Hendrickson, 53 Mich. 525, 19 N. W. 169; State v. Wallace, 9 N. H. 515; State v. Shover, 64 N. J. L. 65, 44 Atl. 850; State v. Snover, 65

N. J. L. 289, 47 Atl. 583; State v. Stubbs, 108 N. Car. 774, 13 S. E. 90; State v. Guest, 100 N. Car. 410, 6 S. E. 253; State v. Wheeler, 104 N. Car. 893, 10 S. E. 491; Commonwealth v. Mosier, 135 Pa. St. 221, 19 Atl. 943; Richardson v. State, 34 Tex. 142; Thayer v. Davis, 38 Vt. 153; State v. Bridgman, 49 Vt. 202; State v. Potter, 52 Vt. 33.

¹⁵ Crane v. People, 168 Ill. 395, 48 N. E. 54. See also, Vol. I, § 176.

true inquiry is, and one a jury will scarcely err in determining correctly, when the circumstances are in evidence, was it a living together, or a mere single act of illicit intercourse; was it cohabitation, looking to the intent of the parties, or a mere adulterous intimacy without any purpose of its continuance?"¹⁶

§ 2798. Marriage—Proof of necessary.—In prosecutions for adultery under the statutes of the several states generally it is absolutely essential that the proof show that at the time of the alleged adulterous intercourse one of the parties was lawfully married to some person other than the one with whom the alleged act of adultery was committed. In other words, proof of marriage is necessary to sustain a conviction under such statutes.¹⁷ And it is held in some jurisdictions that a marriage in fact as distinguished from one that may be inferred from circumstances must be proved in criminal cases.¹⁸

§ 2799. Marriage—Method of proving.—On this question of the method of making proof of marriage the Supreme Court of New Hampshire has very aptly stated the rule as follows: "Proof of a marriage, then, may be made in various ways, according to the nature of the proceeding in which the proof is required. In civil actions, excepting that for criminal conversation, it may be inferred from those circumstances which generally accompany a marriage, such as acknowledgment, reputation, cohabitation, etc. But in criminal prosecutions, like indictments for bigamy, adultery, etc., direct

¹⁶ *Hall v. State*, 53 Ala. 463; *State v. Glaze*, 9 Ala. 283; *Collins v. State*, 14 Ala. 608; *Linton v. State*, 88 Ala. 216, 7 So. 261; *Walker v. State*, 104 Ala. 56, 16 So. 7; *Wright v. State*, 108 Ala. 60, 18 So. 941; *Luster v. State*, 23 Fla. 339; *Bally v. State*, 36 Neb. 808, 55 N. W. 241; *Searls v. People*, 13 Ill. 597; *State v. Way*, 5 Neb. 283; *State v. Kirkpatrick*, 63 Iowa 554, 19 N. W. 660; *State v. Crouner*, 56 Mo. 147; *State v. Gartrell*, 14 Ind. 280; *Granberry v. State*, 61 Miss. 440; *People v. Gates*, 46 Cal. 52; *Miner v. People*, 58 Ill. 59; *McLeland v. State*, 25 Ga. 477; *Swancoat v. State*, 4 Tex. App. 105;

Parks v. State, 4 Tex. App. 134; *Richardson v. State*, 37 Tex. 346; *Traverse v. State*, 61 Wis. 144, 20 N. W. 724; *State v. Marvin*, 12 Iowa 499; *Commonwealth v. Calef*, 10 Mass. 153; *Collum v. State*, 10 Tex. App. 708.

¹⁷ *Buchanan v. State*, 55 Ala. 154; *State v. Schweitzer*, 57 Conn. 532, 18 Atl. 787; *State v. Sanders*, 30 Iowa 582; *State v. Coffee*, 39 Mo. App. 56; *Lord v. State*, 17 Neb. 526, 23 N. W. 507; *Tucker v. State*, 35 Tex. 113.

¹⁸ *State v. Hodgskins*, 19 Me. 155; *State v. Coffee*, 39 Mo. App. 56.

evidence of the marriage is required, and this may appear from the testimony of witnesses who were present at the ceremony. This constitutes proof of a marriage in fact, and is merely direct evidence of the marriage, as contradistinguished from cohabitation, etc., which is indirect evidence of the marriage."¹⁹ But it is held that in this class of cases proof of marriage cannot be made by reputation or general repute.²⁰

§ 2800. Marriage—Proof by records.—The proof of such marriage may be made by the proper legal record; but such documentary evidence must be lawful; it must comply strictly with the requirements of the law and must be complete.²¹ And where the proof is attempted to be made by introducing in evidence the marriage certificate in order to make this sufficient it must be followed by proof of the identity of the persons. The correspondence of the names of the persons mentioned in the marriage certificate and named in the indictment is not sufficient in the absence of such proof of identity. In other words, the persons accused must be proved to be the persons lawfully married.²²

§ 2801. Marriage—Proof by persons present.—So the marriage may be proved by the testimony of persons who were actually present and witnessed the ceremony.²³ In making proof of the marriage ceremony it has been held that the proof must show the ceremony such as the law requires in such cases. And in addition to the proof of the ceremony it must be shown that the person performing the ceremony was clothed with legal authority for that purpose. The very purpose of requiring the testimony of the person present at the marriage is to show its validity and legality and to prove that all the

¹⁹ *State v. Winkley*, 14 N. H. 480; *State v. Schweitzer*, 57 Conn. 532, 18 Atl. 787; *Lord v. State*, 17 Neb. 526, 23 N. W. 507.

²⁰ *Morgan v. State*, 11 Ala. 289; *Buchanan v. State*, 55 Ala. 154; *Owens v. State*, 94 Ala. 97, 10 So. 669; *State v. Coffee*, 39 Mo. App. 56.

²¹ *Commonwealth v. Littlejohn*, 15 Mass. 163; *State v. Winkley*, 14 N. H. 480; *State v. Colby*, 51 Vt. 291.

²² *Wedgwood's Case*, 8 Me. 75; *Commonwealth v. Norcross*, 9 Mass.

492; *People v. Broughton*, 49 Mich. 339, 13 N. W. 621; *State v. Brecht*, 41 Minn. 50, 42 N. W. 602; *State v. Wallace*, 9 N. H. 515; *State v. Winkley*, 14 N. H. 480.

²³ *Commonwealth v. Norcross*, 9 Mass. 492; *Commonwealth v. Littlejohn*, 15 Mass. 163; *Wedgwood's Case*, 8 Me. 75; *Lord v. State*, 17 Neb. 526, 23 N. W. 507; *State v. Marvin*, 35 N. H. 22; *State v. Rood*, 12 Vt. 396.

circumstances attending the ceremony were such as to constitute in fact a legal marriage. It is therefore held essential in such cases to show that the person solemnizing the marriage was within some of the classes of persons legally authorized so to do.²⁴

§ 2802. Proof of marriage—Admissions, etc.—In prosecutions for adultery it has been held in some jurisdictions that the prior admissions, declarations and conduct of the accused, the holding out to the world that such relation does exist between parties who are living together, are admissible for the purpose of proving the marriage.²⁵

§ 2803. Proof of marriage—Prima facie case.—But proof for this purpose may be sufficient which makes a prima facie case. For instance, proof that the person officiating was and had been for many years an acting minister; that he was in the habit of performing ministerial duties; that he witnessed the contract of marriage in his official capacity or proof of any other facts or circumstances which show that he comes within the specified statutory class is sufficient.²⁶ Where proof of any formal marriage is made and is followed by proof showing subsequent cohabitation and the parties recognize each other as husband and wife, it has been held to be sufficient prima facie proof of the marriage.²⁷

§ 2804. Invalid marriage as a defense—Burden of proof.—It is almost the universally conceded rule that a marriage between two

²⁴ *State v. Hodgskins*, 19 Me. 155; *People v. Isham*, 109 Mich. 72, 67 N. W. 819; *State v. Brecht*, 41 Minn. 50, 42 N. W. 602; *Lord v. State*, 17 Neb. 526, 23 N. W. 907.

²⁵ *Cameron v. State*, 14 Ala. 546, 48 Am. Dec. 111; *Buchanan v. State*, 55 Ala. 154; *Langtry v. State*, 30 Ala. 536; *Owens v. State*, 94 Ala. 97, 10 So. 669; *Cook v. State*, 11 Ga. 53, 56 Am. Dec. 410; *Wood v. State*, 62 Ga. 406; *State v. Sanders*, 30 Iowa 582; *Gayford's Case*, 7 Me. 57; *Ham's Case*, 11 Me. 391; *State v. Libby*, 44 Me. 469, 69 Am. Dec. 115; *Commonwealth v. Thompson*, 99 Mass. 444; *Commonwealth v. Holt*, 121 Mass. 61; *People v. Imes*, 110

Mich. 250, 68 N. W. 157; *State v. McDonald*, 25 Mo. 176; *State v. Behrman*, 114 N. Car. 797, 19 S. E. 220; *Wolverton v. State*, 16 Ohio 173; *Commonwealth v. Manock*, 2 Cr. L. Mag. 239; *State v. Medbury*, 8 R. I. 543; *State v. Hilton*, 3 Rich. (S. Car.) 434; *Boger v. State*, 19 Tex. App. 91.

²⁶ *Goshen v. Stonington*, 4 Conn. 209; *State v. Brecht*, 41 Minn. 50, 42 N. W. 602; *Londonderry v. Chester*, 2 N. H. 268, 276; *State v. Winkley*, 14 N. H. 480; *Lord v. State*, 17 Neb. 526, 23 N. W. 507.

²⁷ *State v. Winkley*, 14 N. H. 480; *State v. Rood*, 12 Vt. 396.

persons is invalid where either at the time has a husband or a wife living. But to make cohabitation under such a marriage adulterous the proof must show that the accused person knew that the other party to the marriage had a legal consort. The rule is that cohabitation which follows a *prima facie* valid marriage is a protection against the charge or crime of adultery, in the absence of knowledge that either of the parties was at the time married to another person. Thus it has been held that a woman could not be convicted on a charge of adultery where the cohabitation followed a legitimate marriage ceremony, notwithstanding the fact that the supposed husband had a wife living, in the absence of proof that the accused knew that her supposed husband had a legal wife. The burden is upon the state to prove such knowledge on the part of one accused under such circumstances in cases only, however, where the alleged adulterous cohabitation followed a *prima facie* valid marriage. In such cases in the absence of such knowledge a woman could be neither morally or legally guilty of a crime.²⁸ But mere suspicion will not supply the proof of such knowledge. Proof of such circumstances or situation as to raise the presumption that the accused must have known of the fact might be sufficient. But such proof or presumption must be strong enough to overcome or repel all reasonable doubt.²⁹

§ 2805. **Invalid divorce—No defense.**—So where the husband or wife procures a divorce and is again married and the decree of divorce for any reason is shown to be invalid, the subsequent cohabitation has been held to be adulterous and criminal and the marriage no defense.³⁰ And where a husband and wife separate and the husband thereafter marries this is not a sufficient excuse for the wife re-marrying without having procured a divorce; it has been held in such a case that the subsequent illegal marriage of one was not a license to the other, and neither was ignorance of the law sufficient excuse.³¹

²⁸ *Banks v. State*, 96 Ala. 78, 11 So. 404; *Commonwealth v. Munson*, 127 Mass. 459; *Hildreth v. State*, 19 Tex. App. 195; *Swancoat v. State*, 4 Tex. App. 105.

²⁹ *Vaughan v. State*, 83 Ala. 55, 3 So. 530.

³⁰ *State v. Whitcomb*, 52 Iowa 85, 2 N. W. 970; *State v. Watson*, 20 R. I. 354, 39 Atl. 193.

³¹ *State v. Goodenow*, 65 Me. 30.

CHAPTER CXXXII.

ARSON.

Sec.	Sec.
2806. Generally.	2813. Evidence of other fires and crimes.
2807. Presumptions.	2814. Evidence of certain facts concerning the property burned.
2808. Burden of proof.	2815. Admissions and confessions.
2809. Questions of law or fact.	2816. Evidence in general.
2810. Evidence of motive.	
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§ 2806. **Generally.**—Arson, at common law, is the act of unlawfully and maliciously burning the house of another. The word “house,” as here understood, includes not merely the dwelling-house, but all outhouses which are parcel thereof.¹ Under many statutes arson is the wilful and malicious burning of a building with intent to destroy it, and under some of the statutes arson is divided into degrees. There must be a burning, although not necessarily an entire destruction of the building or any material part,² but malice is an essential element, although it may often be inferred, and the corpus delicti is said to consist not only in the burning of the building but also in the fact that it was burned by the wilful and malicious act of one criminally responsible, and not by accident or natural causes.³ At common law and under some of the statutes it is an offense against the possession rather than against the property, and a tenant in actual occupancy of the premises, under a lease of the building, can-

¹ Black Law Dict.; as to what is a house within the meaning of that term as used in the law relating to arson, see 71 Am. St. 266-269, note.

² See, *Mary v. State*, 24 Ark. 44, 81 Am. Dec. 60; *Graham v. State*, 40 La. 659; *State v. Dennin*, 32 Vt. 158; *Woodford v. People*, 62 N. Y.

117, 20 Am. R. 464; *Smith v. State*, 23 Tex. App. 357, 5 S. W. 219, 59 Am. R. 774.

³ *Winslow v. State*, 76 Ala. 42; *Jesse v. State*, 28 Miss. 100; *Sam v. State*, 33 Miss. 347; *Phillips v. State*, 29 Ga. 105; *State v. Mitchell*, 5 Ired. L. (N. Car.) 350.

not be held guilty of arson in burning it;⁴ but under many of the statutes the rule is otherwise.⁵

§ 2807. Presumptions.—Among the most common presumptions that have been held to arise in prosecutions for arson are the following: The presumption, where a building is burned and there is nothing to the contrary, is that the fire was caused by accident rather than by the deliberate intentional act of the accused.⁶ But if a deliberate act of firing is proved a presumption may arise that there was an intent to injure the owner or insurer.⁷ So, there is generally a presumption that one intends the natural consequence of his act.⁸ So also it may be inferred that one who was alive in a prison a short time before the building was burned, was still alive at the time of the fire.⁹ Direct proof of an intent to commit arson is not required. The intent may be inferred from the circumstances attendant on the burning.¹⁰ So, it has been held that the intent may be inferred from the hostility of the accused to the owner.¹¹

⁴ *State v. Young*, 139 Ala. 136, 36 So. 19; *State v. Fish*, 27 N. J. L. 323; *State v. Hannett*, 54 Vt. 83; *McNeal v. Woods*, 3 Blackf. (Ind.) 485. So where the owner burns his own building, of which he is the occupant. *People v. De Winton*, 113 Cal. 403, 45 Pac. 708, 54 Am. St. 357; *State v. Sarvis*, 45 S. Car. 668, 24 S. E. 53, 32 L. R. A. 647; see also, as to property owned by husband and wife, *Garrett v. State*, 109 Ind. 527, 10 N. E. 570; *Snyder v. People*, 26 Mich. 106, 12 Am. R. 302.

⁵ See, *Lipschitz v. People*, 25 Colo. 261, 53 Pac. 1111; *State v. Moore*, 61 Mo. 276; *Allen v. State*, 10 Ohio St. 287; *Kelley v. State*, 44 Tex. Cr. App. 187, 188, 70 S. W. 20. So under many statutes the owner may be convicted of arson, at least where he burns his building to defraud the insurer, or the like. *Shepherd v. People*, 19 N. Y. 537; *Commonwealth v. Bradford*, 126 Mass. 42;

Meister v. People, 31 Mich. 99; *State v. Hurd*, 51 N. H. 176; *State v. Byrne*, 45 Conn. 273; *People v. Hughes*, 29 Cal. 257; *Erskine v. Commonwealth*, 8 Gratt. (Va.) 624; *State v. Elder*, 21 La. Ann. 157; *State v. Babcock*, 51 Vt. 570.

⁶ *Phillips v. State*, 29 Ga. 105.

⁷ *State v. Jaynes*, 78 N. Car. 504; *State v. Byrne*, 45 Conn. 273; *Commonwealth v. Harney*, 10 Metc. (Mass.) 422; *People v. Vasalo*, 120 Cal. 168, 52 Pac. 305; *Rex v. Farrington, R. & R.* 207.

⁸ *State v. Phifer*, 90 N. Car. 721; see also, *Morris v. State*, 124 Ala. 44, 27 So. 336.

⁹ *Childress v. State*, 86 Ala. 77, 5 So. 775.

¹⁰ *Commonwealth v. Goldstein*, 114 Mass. 272; *State v. Lytle*, 117 N. Car. 799, 23 S. E. 476.

¹¹ *State v. Crawford*, 99 Mo. 74, 12 S. W. 354.

§ 2808. **Burden of proof.**—The burden of proof is on the state to prove the commission of the act by the accused, and the defendant's guilt must be proved beyond a reasonable doubt.¹² Thus, it must be proved beyond a reasonable doubt that the burning was wilfully and maliciously caused by some person who was morally responsible for his actions.¹³ So the prosecution generally has the burden of proving beyond a reasonable doubt that the accused was personally present where he could have committed the offense.¹⁴ The dwelling or other building must be proved substantially as laid in the indictment.¹⁵ But description and proof by street and number, or by its proximity to well-known landmarks, is sufficient to sustain the venue.¹⁶ The ownership of the building need not be strictly proved, unless it is an essential element of the crime, as when one is indicted for setting fire to his own house.¹⁷ So, where the indictment averred that the ownership of the building was unknown to the grand jury, it was held that it was unnecessary to prove such averment.¹⁸ It need not be shown that the wood blazed, but proof that the wood or other inflammable material was charred so as to destroy the fiber or identity is generally required. A mere discoloration or scorching black by smoke or heat is not enough.¹⁹

§ 2809. **Questions of law or fact.**—Whether there was a burning within the meaning of the statute as explained by the court, has been held a question of fact for the jury.²⁰ And whether an incomplete building was so far advanced toward completion as to be a "building" within the statute was held to be a question for the jury.²¹ So,

¹² *McMahon v. State*, 17 Tex. App. 321; *Clark v. State*, 37 Ga. 191.

¹³ *Thomas v. State*, 41 Tex. 27; *Brown v. Commonwealth*, 87 Va. 215, 12 S. E. 472; *Jesse v. State*, 28 Miss. 100; *Jenkins v. State*, 53 Ga. 33; *Winslow v. State*, 76 Ala. 42.

¹⁴ *People v. Fairchild*, 48 Mich. 31, 11 N. W. 773.

¹⁵ *State v. Jeter*, 47 S. Car. 2, 24 S. E. 889.

¹⁶ *People v. Handley*, 100 Cal. 370, 34 Pac. 853.

¹⁷ *People v. Handley*, 100 Cal. 370, 34 Pac. 853.

¹⁸ *Childress v. State*, 86 Ala. 77, 5 So. 775.

¹⁹ *Woolsey v. State*, 30 Tex. App. 346, 17 S. W. 546; *State v. Hall*, 93 N. Car. 571; see, however, for evidence of burning held sufficient, *People v. Simpson*, 50 Cal. 304; *People v. Haggerty*, 46 Cal. 355; *State v. Spiegel*, 111 Iowa 701, 83 N. W. 722; *Commonwealth v. Tucker*, 110 Mass. 403. Boards showing marks of fire have been held admissible. *Commonwealth v. Betton*, 5 Cush. (Mass.) 427.

²⁰ *Commonwealth v. Betton*, 5 Cush. (Mass.) 427.

²¹ *Commonwealth v. Squire*, 42 Mass. 258.

where one is charged with the burning of a barn and the evidence shows that he set fire to a hay-stack, from which the barn ignited, the motive of the defendant is a question of fact for the jury.²² And where it is charged that there was a setting afire with intent to defraud some one, the question of intent should be submitted to the jury.²³ So, of course, it is for the jury to determine whether the accused is the guilty party.

§ 2810. Evidence of motive.—Motive may be shown in many ways. It may be shown by evidence of threats and ill-feeling toward the owner of the building destroyed.²⁴ And evidence that defendant in an indictment for arson in burning his own dwelling was on bad terms with his wife, has been held admissible to show that he would readily do an act to endanger her safety.²⁵ So, where one has ill-will against the owners of a building on account of their interference and objections in his love affairs, evidence of such fact is admissible as tending to show that the defendant committed the crime in revenge.²⁶ And evidence of ill-will to the members of the family of the occupant of the premises is admissible for purpose of showing a motive for the act, even though such members did not reside on the premises.²⁷ Evidence that the defendant threatened to sue the owner and make him “sweat” because he suspected the defendant of robbing his house, is competent to show ill-will by defendant to the owner as a motive for the crime.²⁸ And so a declaration made by the accused that, as he had been put out of a building, no one would ever prosper in that place, or threats of bodily harm made by him and directed against the owner, are admissible to show malice or ill-will.²⁹ But it has been held that the ill-will of defendant, indicted for burning property, toward the agent of the owner of the property, is not admissible to prove a motive, in the absence of evidence of threats against the latter, or of any facts tending to show that defendant’s ill-will had extended to the owner.³⁰ It may be

²² State v. Roberts, 15 Ore. 187, 13 Pac. 896.

²³ State v. Phifer, 90 N. Car. 721.

²⁴ Hinds v. State, 55 Ala. 145.

²⁵ Shepherd v. People, 19 N. Y. 537.

²⁶ State v. Ward, 61 Vt. 153, 17 Atl. 483.

²⁷ State v. Thompson, 97 N. Car. 496, 1 S. E. 921.

²⁸ Commonwealth v. Quinn, 150 Mass. 401, 23 N. E. 54.

²⁹ People v. Eaton, 59 Mich. 559, 26 N. W. 702; Ford v. State, 112 Ind. 373, 14 N. E. 241.

³⁰ State v. Battle, 126 N. Car. 1036, 35 S. E. 624.

shown that the motive of the defendant was the profitable collection of insurance.³¹ Thus, in a prosecution against the insured for burning the property, it is competent to prove an overvaluation of the property insured, and a demand by him for such valuation, for the purpose of showing a motive.³² And evidence of over-insurance upon the goods of the accused destroyed by fire has been held competent, as tending to show probable or possible motive where the testimony was all circumstantial.³³ So, in a prosecution for arson charging the defendant with attempting to destroy his storeroom, filled with goods, in which it appeared that the goods were insured for \$14,000, evidence was held admissible that the defendant, in applying for a traders' license, had stated under oath that he intended to carry in trade a stock not exceeding \$4,000 in busy seasons.³⁴ And evidence of the conduct of the owner of the buildings when present at the fire, and of the value of the buildings, was held admissible where it was contended that the defendant fired the building to obtain the insurance money.³⁵ But evidence as to the pecuniary condition of a defendant on trial for arson has been held incompetent.³⁶ As a general rule any proper evidence of facts tending to show a motive for the crime is admissible.³⁷ Thus, it may be proved that the building burned had papers in it against the interest of the accused.³⁸ And it has been held that on the trial on an indictment for setting fire to a jail, the indictment containing the charges for which accused was in jail is admissible on the question of intent or motive.³⁹

§ 2811. Evidence of threats.—As shown in the last preceding section, evidence of threats is often admitted. Thus, evidence of threats of revenge uttered by the defendant from one to two years before the fire, against the owner of the building burned has been held admissible.⁴⁰ So, evidence of threats made by the defendant against the prosecutor several months before the commission of the offense is

³¹ Commonwealth v. Hudson, 97 Mass. 565.

³² Stitz v. State, 104 Ind. 359, 4 N. E. 145.

³³ State v. Cohn, 9 Nev. 179.

³⁴ Hooker v. State, 98 Md. 145, 56 Atl. 390.

³⁵ State v. Ward, 61 Vt. 153, 17 Atl. 483.

³⁶ State v. Moore, 24 S. Car. 150, 58 Am. R. 241.

³⁷ People v. Murphy, 135 N. Y. 450, 32 N. E. 138; State v. Green, 92 N. Car. 779.

³⁸ Winslow v. State, 76 Ala. 42.

³⁹ Luke v. State, 49 Ala. 30, 20 Am. R. 269.

⁴⁰ Commonwealth v. Goodwin, 14 Gray (Mass.) 55.

proper.⁴¹ And the length of time which has elapsed between the utterance of the threat and the destruction of the building, though, perhaps, affecting the weight of the threat as evidence, has been held to be no objection to its admission.^{41*} But testimony tending to show that a stranger to the trial had made threats against the person and property of the owner of the burned house is generally irrelevant, as it has no bearing on the guilt of the accused.⁴² So evidence of the owner of the property burned, to the effect that some one told him of threats made by a person other than defendant, should not be received.⁴³ But where the proof against the accused was circumstantial as to her guilty agency, it has been held that proof that another person had threatened to burn the house, and was in the vicinity at the time it was burned, was held admissible in behalf of the defendant.⁴⁴ A threat against a building specified is not rendered inadmissible as evidence by a subsequent change in the ownership of the building.⁴⁵ Evidence of threats made by the defendant against the owner of a building next to the one burned and which caught on fire, has been held admissible.⁴⁶

§ 2812. **Evidence of previous attempts.**—A previous attempt to burn a building may be shown to establish intent, if accompanied by evidence of circumstances tending to implicate the defendant on the former occasion⁴⁷ as well as the latter. And evidence of a previous conspiracy to burn the same building is admissible.⁴⁸ And such evidence is admissible where there is testimony that the accused at the time of the previous attempt rode to the place to which he went at the time of the fire.⁴⁹ An admission by the accused that on the night of a previous attempt to burn the same property, and also on the night of the fire, he used a team which the evidence associated with the perpetrator of the crime, is admissible.⁵⁰ And the fact that the defendant in an indictment for arson, a few months before the

⁴¹ *Hinds v. State*, 55 Ala. 145.

⁴⁶ *Bond v. Commonwealth*, 83 Va.

^{41*} *Commonwealth v. Quinn*, 150 Mass. 401, 23 N. E. 54.

581, 2 S. E. 149.

⁴² *State v. Crawford*, 99 Mo. 74, 12 S. W. 354.

⁴⁷ *State v. Hallock*, 70 Vt. 159, 40 Atl. 51; *Commonwealth v. Bradford*,

⁴³ *Ford v. State*, 112 Ind. 373, 14 N. E. 241.

126 Mass. 42; *People v. Shainwold*, 51 Cal. 468; *State v. Rohfrisch*, 12 La. Ann. 382.

⁴⁴ *Hensley v. State*, 9 Humph. (Tenn.) 243.

⁴⁸ *Meister v. People*, 31 Mich. 99.

⁴⁵ *State v. Fenlason*, 78 Me. 495, 8 Atl. 459; *Commonwealth v. Crowe*, 165 Mass. 139, 42 N. E. 563.

⁴⁹ *State v. Ward*, 61 Vt. 153, 17 Atl. 483.

⁵⁰ *State v. Ward*, 61 Vt. 153, 17 Atl. 483.

burning charged, requested the witness to burn the house, is admissible evidence against him.⁵¹

§ 2813. **Evidence of other fires and crimes.**—Evidence of other fires has frequently been admitted as tending to show the defendant's intent, or that the defendant set fire to the building named in the indictment. Thus, on a trial for setting fire to an outhouse "used as a kitchen," evidence that, at the same hour also an attempt was made to set fire to the dwelling-house, some few yards off, by means of fagots of wood tied up with a rope belonging to defendant, both buildings having been saturated in places with kerosene, was held admissible.⁵² So evidence of other fires is admissible if it tends to directly connect the defendant with the burning alleged in the indictment, to establish intent or to show the incendiary origin of the crime.⁵³ And evidence which shows that a prosecuting witness took extreme caution against fire "because of other fires" at specified times, has been held admissible as tending to prove an incendiary origin of the fire in question.⁵⁴ But evidence that certain other buildings were burned in the same town, about the time of the burning of the building alleged in the indictment, is not admissible, for such evidence does not tend to show either that defendant did or did not set fire to the building named in the indictment.⁵⁵ And so evidence as to the burning of a depot in a neighboring town, and as to the presence of a strange man in the community at the time of the burning is not admissible.⁵⁶ Evidence showing that some years previously, several buildings, in which defendant had some interest, and which were insured, were burned, is not relevant in a prosecution for setting fire to a building with intent to defraud the insurers.⁵⁷ But, where, on a trial for arson, it appears that the fire was probably set to create an opportunity to commit a larceny it has been held that evidence of the larceny may be admitted to prove the identity of the prisoner.⁵⁸ So on trial of an indictment for arson, evidence of a subsequent criminal act has been admitted when connected in character and purpose with the offense charged.⁵⁹ And evidence that the

⁵¹ *Martin v. State*, 28 Ala. 71.

⁵² *Commonwealth v. Gauvin*, 143

⁵³ *State v. Thompson*, 97 N. Car. Mass. 134, 8 N. E. 895.
496, 1 S. E. 921.

⁵⁴ *State v. Dukes*, 40 S. Car. 481,
19 S. E. 134.

⁵⁵ *Knights v. State*, 58 Neb. 225,
78 N. W. 508, 76 Am. St. 78; *Com-*
monwealth v. McCarthy, 119 Mass.
354.

⁵⁶ *State v. Raymond*, 53 N. J. L.
260, 21 Atl. 328.

⁵⁷ *Jones v. State*, 63 Ga. 395.

⁵⁸ *State v. McMahon*, 17 Nev. 365,
30 Pac. 1000.

⁵⁹ *Kramer v. Commonwealth*, 87
Pa. St. 299.

defendant obtained powder to set fire by breaking into a certain powder store is competent.⁶⁰ In order to show that a burning was intentional, evidence of the burning of other property belonging to the accused is admissible. For example, it has been held that when it is charged that the accused has set his own house on fire, it may be shown that at some previous time the same or other buildings belonging to him had been burned, or that he had endeavored to induce some one to set fire to his buildings.⁶¹ And evidence tending to show that defendant started former fires on the property which he is charged with burning is competent to prove intent.⁶²

§ 2814. Evidence of certain facts concerning the property burned. As a general rule evidence of the ownership, occupancy and contents of the building burned is admissible in a proper case.⁶³ And the occupancy, control and possession of property destroyed by fire may be shown by parol evidence.⁶⁴ So, parol evidence is generally admissible to prove the ownership of the property.⁶⁵ And where it was shown that the defendant occupied the premises burned, under a lease, parol testimony of the ownership was held admissible.⁶⁶ It has also been decided that when ownership is relevant, it may be proved by a certified copy of a record with oral evidence that the accused had made an oral lease, or had signed as owner.⁶⁷ Evidence that the husband furnished part of the money to build a house originally, which house now belongs to his wife and which he is charged with burning, is not admissible, however, since such evidence would not change the ownership.⁶⁸ So, it has been held that testimony as to the ownership is not relevant if there is no question raised as to ownership aside from the statement in the indictment as to the occupation and possession at the time of the fire.⁶⁹ Where the contents or occupancy of a dwelling become important and essential it may be shown that adjoining buildings were occupied in like manner, especially where all the buildings constitute but one dwelling.⁷⁰

⁶⁰ State v. Roberts, 15 Ore. 187, 13 Pac. 896.

⁶¹ People v. Fournier, (Cal.) 47 Pac. 1014; Commonwealth v. Bradford, 126 Mass. 42; Melster v. People, 31 Mich. 99.

⁶² People v. Lattimore, 86 Cal. 403, 24 Pac. 1091.

⁶³ State v. Elder, 21 La. Ann. 157; Hamilton v. People, 29 Mich. 173.

⁶⁴ State v. Elder, 21 La. Ann. 157.

⁶⁵ State v. Jaynes, 78 N. Car. 504.

⁶⁶ Rogers v. State, 26 Tex. App. 404, 9 S. W. 762.

⁶⁷ Commonwealth v. Preece, 140 Mass. 276, 5 N. E. 494.

⁶⁸ Garrett v. State, 109 Ind. 527, 10 N. E. 570.

⁶⁹ People v. Scott, 32 Cal. 200.

⁷⁰ People v. Cassidy, 60 Hun (N. Y.) 579, 14 N. Y. S. 349.

And in an indictment for burning a building with intent to injure an insurance company, testimony that the building had been occupied as a summer hotel during the preceding summer was held competent as a description of the building.⁷¹ But it has been held error to admit evidence of the contents of a barn where it is not disputed that the barn was a building.⁷² Evidence is competent to show that a building was called a barn though it was used for a purpose other than that.⁷³ And where there is an indictment for burning a certain building, although evidence of what was in it at the time it was burned is not otherwise competent, yet what was kept in it from time to time is relevant and competent to show that the building was such a one as described in the indictment.⁷⁴ A map of the building set on fire and of the adjacent and surrounding premises is competent for the purpose of describing the scene of the crime.⁷⁵ If the accused is charged with setting fire to the house of another, evidence to show his familiarity with the premises may be admissible.⁷⁶

§ 2815. Admissions and confessions.—Admissions and confessions of the accused are admissible in a proper case. Thus, a declaration made by the accused or made in his presence and adopted by him, contemporaneous with and explanatory of the main transaction, is admissible.⁷⁷ But a statement made some time after his barn was burned, that defendant had good insurance on his house, and it might go to blazes with the barn, has been held not to be admissible to show that he burned the barn.⁷⁸ When the burning of the house is established by other evidence, the confessions of the defendant are admissible to show that the burning was felonious, and that he was the criminal agent.⁷⁹ Thus, it may be shown that the defendant, on his preliminary examination, gave an account of his whereabouts on the night of the fire that was inconsistent with his former statements.⁸⁰ So, an admission by accused voluntarily made,

⁷¹ Commonwealth v. Wesley, 166 Mass. 248, 44 N. E. 228.

⁷² Simpson v. State, 111 Ala. 6, 20 So. 572.

⁷³ State v. Smith, 28 Iowa 565.

⁷⁴ Brown v. State, 52 Ala. 345.

⁷⁵ People v. Cassidy, 133 N. Y. 612, 30 N. E. 1003.

⁷⁶ People v. Murphy, 135 N. Y. 450, 32 N. E. 138.

⁷⁷ People v. Eaton, 59 Mich. 559, 26 N. W. 702; State v. Ward, 61 Vt. 153, 17 Atl. 483; Commonwealth v. Wesley, 166 Mass. 248, 44 N. E. 228.

⁷⁸ Hamilton v. People, 29 Mich. 173.

⁷⁹ Sam v. State, 33 Miss. 347.

⁸⁰ People v. Eaton, 59 Mich. 559, 26 N. W. 702.

to an officer and in a letter written to a third party, after his arraignment, that he was near the farm on which the burned property was located, is admissible.⁸¹

§ 2816. **Evidence in general.**—It may be stated in general that the same rules of evidence obtain in trials for arson as in other criminal actions. Thus real evidence may be submitted to the jurors, for example, a board torn from the building may be exhibited to the jury.⁸² And the jury may be sent out to view the building burned.⁸³ So the location and occupation of buildings near that which was burned may be shown by maps, photographs or otherwise, to enable the jury to understand the evidence more clearly.⁸⁴ But the court is not obliged to stop proceedings in order to try an experiment in open court as to the length of time it would take a candle to burn down to the point of those discovered in the burned building after the fire.⁸⁵ Yet it is within the discretion of the trial court to admit evidence of such experiments.⁸⁶ The identity of one charged with arson may be shown by evidence of recognition of his voice, though the witness did not see him.⁸⁷ Evidence showing the conduct of the accused is often admissible. Thus, evidence that the accused abused and threatened the owner both before and after the burning and after the fire stated to him, "you have not yet got what I intend to give you," was held admissible.⁸⁸ So, evidence of the movements of defendants during the night and just preceding the fire is admissible.⁸⁹ And where there was evidence that the defendant was seen to approach the building with a jug in her hand, and pour oil from it and set it afire, evidence that the jug was formerly in possession of her husband was held admissible as evidence of the prisoner's identity.⁹⁰ And so, where the evidence tended to show that the one who set the fire had with him a sleigh which made certain peculiar tracks, evidence that a sleigh which the accused had on the night of the fire fitted into the tracks is admissible where other evidence tended to connect the accused with the arson, such evidence being held admissible even

⁸¹ *People v. Eaton*, 59 Mich. 559, 26 N. W. 702.

⁸² *Commonwealth v. Betton*, 5 Cush. (Mass.) 427.

⁸³ *Fleming v. State*, 11 Ind. 234.

⁸⁴ *People v. Cassidy*, 133 N. Y. 612, 30 N. E. 1003.

⁸⁵ *People v. Levine*, 85 Cal. 39, 22 Pac. 969.

⁸⁶ *People v. Levine*, 85 Cal. 39, 22 Pac. 969.

⁸⁷ *Davis v. State*, 15 Tex. App. 594.

⁸⁸ *Shifflet v. Commonwealth*, 14 Gratt. (Va.) 652.

⁸⁹ *People v. Burton*, 77 Hun (N. Y.) 498, 28 N. Y. S. 1081.

⁹⁰ *Thomas v. State*, 107 Ala. 13, 18 So. 229.

though there is no evidence that the defendant was actually seen with the sleigh upon the road.⁹¹ But on the trial of an indictment for burning a stable, evidence that the measurement of certain tracks leading from the stable towards defendant's house had been applied to the foot of the brother of the defendant, who had been at first arrested for the offense, and that the measurement did not correspond, is not admissible.⁹² Where it appeared that a fire started in a shed in which was kept a gasoline stove, evidence that the stove leaked, and had once caught on fire, was held admissible as tending to account for the fire which the defendant was charged with setting, at least where the evidence against him was entirely circumstantial.⁹³ As already intimated, evidence tending to show that the defendant made preparations to commit the crime is admissible. So, it may be proved where and how he procured gunpowder with which the fire was started, even where this involves proving another crime and that he was seen in the building after business hours or observed skulking near by.⁹⁴ And it may be shown that the accused, when arrested, soon after the fire, had poisoned meat in his possession, prepared in a peculiar manner, where a dog belonging to the owner of the burned property was poisoned on the night of the fire, and a postmortem examination showed poisoned meat in the animal's stomach similarly prepared.⁹⁵ Evidence is admissible that goods which were in the house when it was burned were subsequently found in a trunk in the possession of the accused.⁹⁶ And evidence of an odor of kerosene on defendant's clothing at the time of the fire is admissible in a prosecution against him for burning his property to defraud insurers, there being evidence that kerosene was used to burn the building.⁹⁷ And so evidence that the accused forbade the removal of property from the house of which he was the owner while it was burning is admissible as tending to prove that he started the fire.⁹⁸ And the mutilation of books by or at the instance of the defendant is pertinent to the issue if it will show the interest of the defendant in the insured property which he is charged with burn-

⁹¹ State v. Ward, 61 Vt. 153, 17 Atl. 483.

⁹² State v. England, 78 N. Car. 552.

⁹³ State v. Delaney, 92 Iowa 467, 61 N. W. 189.

⁹⁴ State v. Roberts, 15 Ore. 187, 13 Pac. 896; State v. Crawford, 99 Mo. 74, 12 S. W. 354.

⁹⁵ Halleck v. State, 65 Wis. 147, 26 N. W. 572.

⁹⁶ State v. Vatter, 71 Iowa 557, 32 N. W. 506.

⁹⁷ People v. Bishop, 134 Cal. 682, 66 Pac. 976.

⁹⁸ Bluman v. State, 33 Tex. Cr. App. 43, 21 S. W. 1027.

ing.⁹⁹ It has been held that in the absence of evidence that the accused, charged with arson, was of uncommon height or figure, it was error to admit as affirmative evidence of identification that witnesses met a man in a public highway, in the evening, shortly after the fire, and from one to two miles from the building burned, of about the same size and height of accused.¹⁰⁰ A witness should not be permitted to testify that "he thought the house was set on fire by some one."¹⁰¹ It has been held that a question put to the prosecuting witness, "What was the state of feeling between you and the accused at the time of the burning?" is not leading.¹⁰² And where a witness testified that he saw the three persons charged with arson together soon after the fire, he should be allowed to be cross-examined as to whether this impressed him at the time and when he first mentioned it.¹⁰³ Among the many miscellaneous matters which have been admitted as evidence are the following: Evidence of the relation existing between the accused and the person whose property was burned is admissible in identifying him as the wrongdoer;¹⁰⁴ where an indictment charges the burning of a number of houses which were destroyed by one fire, evidence is admissible as to the burning of all of them;¹⁰⁵ but where two persons are indicted separately for the same offense, the record of the conviction of one has been held not to be admissible as evidence against the other;¹⁰⁶ the opinions of fire insurance experts, based on an examination of the debris, are admissible as to the quantity of goods which have been burned;¹⁰⁷ and facts tending to corroborate the testimony of an accomplice, although not otherwise directly bearing on the main fact tried, may be admissible.¹⁰⁸ It has been held that in a prosecution for burning a building with intent to defraud an insurance company, it is not necessary to prove the legal existence of the company.¹⁰⁹

⁹⁹ *People v. O'Neill*, 112 N. Y. 355, 19 N. E. 796.

¹⁰⁰ *People v. Gotshall*, 123 Mich. 474, 82 N. W. 274.

¹⁰¹ *State v. Nolan*, 48 Kans. 723, 30 Pac. 486.

¹⁰² *Hinds v. State*, 55 Ala. 145.

¹⁰³ *Hamilton v. People*, 29 Mich. 173.

¹⁰⁴ *Long v. State*, 86 Ala. 36, 5 So. 443.

¹⁰⁵ *Woodford v. People*, 62 N. Y. 117, 20 Am. R. 464.

¹⁰⁶ *Kazer v. State*, 5 Ohio 280.

¹⁰⁷ *Birmingham Fire Ins. Co. v. Pulver*, 126 Ill. 329, 18 N. E. 804.

¹⁰⁸ *Hall v. State*, 3 Lea (Tenn.) 552.

¹⁰⁹ *State v. Byrne*, 45 Conn. 273; *Evans v. State*, 24 Ohio St. 458.

CHAPTER CXXXIII.

ASSAULT AND ASSAULT AND BATTERY.

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Assault.

§ 2817. Definition.—It would seem necessary to have a clear understanding of the definition and meaning of the term assault in order the more readily to comprehend and apply the rules of evidence which govern in cases of criminal assault. A standard law writer defines the term thus: “An attempt, or the unequivocal ap-

pearance of an attempt, with force or violence to do a corporal injury, and may consist of any act which shall convey to the mind of the person set upon, a well-grounded apprehension of personal violence.”¹ Another definition given by a law writer and approved by some courts is: “An assault is any attempt or offer with force or violence to do a corporal hurt to another, whether from malice or wantonness, as by striking at him in a threatening or insulting manner, or with such other circumstances as denote at the time an intention, coupled with a present ability, of actual violence against his person, as by pointing a weapon at him when he is within reach of it.”² The Texas Court of Appeals has defined it as follows: “To constitute an assault there must be the use of some unlawful violence upon the person of another, with intent to injure him or her, or some threatening gesture showing itself or by words accompanying it, an immediate intention to commit a battery.”³ Or as stated by the same court in another case: “In every assault there must be an intention to injure coupled with an act which must at least be the beginning of the attempt to injure then, and not an act of preparation for some contemplated injury that may afterwards be inflicted.”⁴ So it has been defined to be an “unlawful setting upon one’s person;” and it has been held that the assault might consist of indignities heaped upon another.⁵ As stated in an early New York case, “an assault is defined by these, to be an attempt with force or violence to do a corporal injury to another; and may consist of any act tending to such corporal injury, accompanied with such circumstances as denote at the time an intention, coupled with the present ability, of using actual violence against the person. There need not be even a direct attempt at violence; but any indirect preparation towards it, and under the circumstances mentioned, such as drawing a sword or

¹ 2 Archibold Cr. Proc., Pl. & Ev. 41; Pratt v. State, 49 Ark. 179; Kline v. Kline, 158 Ind. 602, 64 N. E. 9; List v. Miner, 74 Conn. 50, 49 Atl. 856; Johnson v. State, 14 Ga. 55; Goodrum v. State, 60 Ga. 509; State v. Harrigan, (Del.) 55 Atl. 5; Stivers v. Baker, 87 Ky. 508, 9 S. W. 491; Perkins v. Stein, 94 Ky. 433, 22 S. W. 649; People v. Lilley, 43 Mich. 521, 5 N. W. 982; Bishop v. Ranney, 59 Vt. 316, 7 Atl. 820.

² Hardy v. Commonwealth, 17 Gratt. (Va.) 592.

³ Carroll v. State, 24 Tex. App. 366, 6 S. W. 42; Jones v. State, 18 Tex. App. 485.

⁴ Johnson v. State, 43 Tex. 576; Higginbotham v. State, 23 Tex. 574; Young v. State, 7 Tex. App. 75.

⁵ Geraty v. Stern, 30 Hun (N. Y.) 426; People v. Moore, 50 Hun (N. Y.) 356, 3 N. Y. S. 159.

bayonet, or even laying one's hand upon his sword, would be sufficient."⁶

§ 2818. Proof of intent.—In establishing the charge of an assault as held in many cases the proof must sufficiently show a present intention to execute the threat or to complete the attempt. The intention to commit the act is the very essence of the offense and must of necessity be shown. So, the intention must be to commit a present and not a future injury. But such intention may be inferred or it may be proved by the circumstances or by the acts and declarations of the accused.⁷ While the offer or attempt to commit the assault must be intentional; and while this intent may be inferred from appearances and circumstances or the acts and conduct of the assailant, yet if notwithstanding such appearances it is evident that there is no intention or present purpose to do the injury, there can be no assault.⁸ It has been held that the drawing of a weapon is generally evidence of an intention to use it. But such an intention may be rebutted by the declarations or circumstances which accompany the act, showing that there was in fact no intention to use the weapon.⁹

§ 2819. Intent inferred from act.—There is a class of cases in which it is very clearly and positively held that the intent to commit an assault may be inferred from the act itself. And the rule has been extended to the point of holding that the positive declaration of the accused to the effect that he did not intend to commit any violence or injury, or that he only intended to frighten the person alleged to have been assaulted, will not be sufficient to overcome the inference of intention from the act itself. Illustrations of this rule are found in a class of cases in which it is held that where a person fires a loaded gun or pistol at or in the direction of another, but without striking him,

⁶ *Hays v. People*, 1 Hill (N. Y.) 351; *People v. Ryan*, 55 Hun (N. Y.) 214, 8 N. Y. S. 241; *People v. McKenzie*, 6 App. Div. (N. Y.) 199, 39 N. Y. S. 951.

⁷ *Perkins v. Stein*, 94 Ky. 433, 22 S. W. 649; *Commonwealth v. Ordway*, 12 Cush. (Mass.) 270; *Cluff v. Mutual &c. Ins. Co.*, 13 Allen (Mass.) 308; *State v. Godfrey*, 17 Ore. 300, 20 Pac. 625; *Vosburg v.*

Putney, 80 Wis. 523, 527, 50 N. W. 403; *Degenhardt v. Heller*, 93 Wis. 663, 68 N. W. 411; 2 *Greenleaf Ev.*, § 83.

⁸ *Smith v. State*, 39 Miss. 521; *State v. Davis*, 1 Ired. L. (N. Car.) 125; 2 *Wharton Cr. Law*, §§ 1241-1244.

⁹ *People v. McMakin*, 8 Cal. 547; *People v. Honshell*, 10 Cal. 83.

reviewing and citing many authorities, clearly showed that “to constitute an assault there must be an intentional attempt to do injury to the person of another by violence, and that such attempt must be coupled with a present ability to do the injury attempted. It is equally manifested that the element of fear or apprehension on the part of the person against whom the attempt is made cannot be controlling or in any way influence the conclusion, for the reason that such person may be assaulted and be wholly unconscious of the injury.”¹⁷ A writer on the law of torts upon an English authority recognizing the necessity of the element of contact as an essential ingredient of the offense says that “any gesture or threat of violence exhibiting an intention to assault, with the means of carrying that threat into effect, is an assault, unless immediate contact is impossible.”¹⁸ Recognizing the necessity of a present ability to execute the threat or carry out the intention the Supreme Court of Vermont defines the offense as follows: “If the party threatening the assault had the ability, means and apparent intention to carry his threat into execution it may, in law, constitute an assault.”¹⁹

§ 2823. Present ability—Meaning.—It is not necessary, however, that the proof shall show that the assailant was in actual striking distance or near enough to have touched or struck the party assailed. If there is an unequivocal purpose of violence which is accompanied by any act by which if continued the violence or injury will be inflicted, it is sufficient. Familiar illustrations of this principle are found in the cases holding that advancing or running toward another, attempting to strike though intercepted before reaching striking distance, is sufficient.²⁰ So, proof of riding after another with the

916, 8 N. Y. S. 241, 369; *State v. Davis*, 1 Ired. L. (N. Car.) 125; *Bloomer v. State*, 3 Sneed (Tenn.) 66; *Berkeley v. Commonwealth*, 88 Va. 1017, 14 S. E. 916; *State v. Levan*, 23 Wash. 547, 63 Pac. 202; *Bryant v. State*, 7 Wyo. 311, 51 Pac. 879, 56 Pac. 596; *United States v. Barnaby*, 51 Fed. 20; *State v. Mills*, 3 Pen. (Del.) 508, 52 Atl. 266; *State v. Di Guglielmo*, (Del.) 55 Atl. 350; *Donnelley v. Territory*, (Ariz.) 52 Pac. 368; *State v. Cody*, 94 Iowa

169, 62 N. E. 702; *Hays v. People*, 1 Hill (N. Y.) 351; *Klein v. State*, 9 Ind. App. 365, 36 N. E. 763.

¹⁷ *State v. Godfrey*, 17 Ore. 300, 20 Pac. 625; *People v. Lilley*, 43 Mich. 521, 5 N. W. 982; *Chapman v. State*, 78 Ala. 463.

¹⁸ *Bishop v. Ranney*, 59 Vt. 316, 7 Atl. 820; *Read v. Coker*, 13 C. B. 850; *Cobbett v. Grey*, 4 Exch. 744.

¹⁹ *Clark v. Downing*, 55 Vt. 259.

²⁰ *State v. Davis*, 1 Ired. L. (N. Car.) 125; *Berkeley v. Common-*

avowed purpose of beating him, although the person escape before being beaten, is sufficient.²¹ But under some statutes it seems that where the assault is made with a dangerous weapon with the intent to alarm or frighten another that the ability to commit the battery need not be proved.²²

§ 2824. Attempt or offer to strike.—Under the definition of assault and as shown by the adjudicated cases, to constitute an assault it is not necessary that the assailant must strike at the person alleged to have been assaulted. The attempt may consist of drawing the fist or raising a stick with the intention either apparent or declared to strike, and so near to the party assailed as to endanger his person; and the act or attitude and the position being sufficient to force him, under a well grounded apprehension of personal injury, either to strike in self-defense or to save himself by flight or retreat.²³ The distinction between an offer and an attempt to strike is thus made by the Supreme Court of North Carolina: "An assault is usually defined to be an offer, or attempt to strike another. An attempt means something more than an offer. As, therefore, an offer is a necessary ingredient in an assault, and as an attempt or anything else is not such, it would probably be more precisely accurate to say, that an assault is an offer to strike another."²⁴ Where an offer or attempt to strike is conditional it is not an assault, as shown by cases already cited; but if the condition is one, which the party has no right to impose, or which in itself is wrong, then such an attempt or offer is held to be an assault.²⁵

§ 2825. Assault by striking at—Variance.—It is not always best or safest to charge in an indictment that the assault was committed by striking at, as it has been held that such a charge must be strictly proved. The safer and more comprehensive charge is

wealth, 88 Va. 1017, 14 S. E. 916;
Stephen v. Myers, 4 Car. & P. 349,
19 E. C. L. 548.

²¹ Morton v. Shoppe, 3 Car. & P.
373, 14 E. C. L. 616.

Kief v. State, 10 Tex. App. 286;
State v. Levan, 23 Wash. 547, 63
Pac. 202.

²² Johnson v. State, 35 Ala. 363;
People v. Yslas, 27 Cal. 630; Lewis
v. Hoover, 3 Blackf. (Ind.) 407;

State v. Myerfield, 61 N. Car. 108;
Commonwealth v. Brungess, 23 Pa.
Co. Ct. 13.

²³ State v. Hampton, 63 N. Car. 13;
State v. Myerfield, 61 N. Car. 108.

²⁴ Commonwealth v. White, 110
Mass. 407; People v. McKenzie, 6
App. Div. (N. Y.) 199, 39 N. Y. S.
951; State v. Myerfield, 61 N. Car.
108.

that the assault was committed by an attempt to strike or that the defendant made an assault and struck at the prosecuting witness. Where it was charged that an assault was committed by striking at the prosecuting witness with a stick and the proof showed only an attempt or offer to strike, it was held to be a fatal variance.²⁶ An assault is said to be "an intentional attempt to strike within striking distance, which fails of its intended effect, either by preventive interference or by misadventure."²⁷

§ 2826. With present ability—Striking distance.—It seems to be clear under the decided cases that the proof must show a present ability to execute the attempt and the intent. But it is not necessary always that the proof show that the accused was actually or really in striking distance. The Supreme Court of California say: "It is not indispensable to the commission of an assault that the assailant should be at any time within striking distance. If he is advancing with intent to strike his adversary and comes sufficiently near to induce a man of ordinary firmness to believe, in view of all the circumstances, that he will instantly receive a blow unless he strike in self defense or retreat, the assault is complete. In such a case the attempt has been made coupled with a present ability to commit a violent injury within the meaning of the statute. It cannot be said that the ability to do the act threatened is wanting because the act was in some manner prevented. In the present case the defendant was guilty of an assault if he advanced on the prosecutrix in such a manner as to threaten immediate violence, notwithstanding she succeeded in making her escape without injury."²⁸

§ 2827. Assault and menace.—There is a distinct and recognized difference between an assault and a menace. A mere menace is not made an offense; neither is a conditional offer to commit violence. An assault consists of more positive acts supplemented by an intent to inflict violence. The Supreme Court of Alabama recognizes these

²⁶ Johnson v. State, 35 Ala. 363; Smith v. Causey, 28 Ala. 655; Lindsay v. State, 19 Ala. 560; Commonwealth v. Gallagher, 6 Metc. (Mass.) 565; see, 1 Roscoe Cr. Ev., §§ 102, 103, 104; 2 Russell Crimes, 788, 794, 795.

²⁷ Lane v. State, 85 Ala. 11, 4 So. 780.

²⁸ People v. Yslas, 27 Cal. 630; State v. Myers, 19 Iowa 517; People v. McKenzie, 6 App. Div. (N. Y.) 199, 39 N. Y. S. 951; Farrar v. State, 29 Tex. App. 250, 15 S. W. 719; State v. Jones, 2 Pen. (Del.) 573, 47 Atl. 1006; People v. Lilley, 43 Mich. 521, 5 N. W. 982; State v. Sims, 3 Strob. (S. Car.) 137.

distinctions in a definition given as follows: "An assault is an attempt, or offer, to do another personal violence, without actually accomplishing it. A menace is not an assault; neither is a conditional offer of violence. There must be a present intention to strike. On the question, how far the intention must be carried into actual execution before the assault becomes complete in law, the authorities do not agree. Holding a gun in a threatening position, without any attempt to use it, or intention to do so, unless first assaulted by the adversary, is not an assault. Drawing a pistol, without presenting or cocking it, is not an assault."²⁹

§ 2828. **Violence intended.**—According to the rule established by many cases, it must be of the essence of an assault that violence was intended. Under another class of cases it is held to be sufficient if the party assailed has reasonable grounds to fear that injury will be done him unless he retreats or defends himself. Where the proof shows that bystanders interfere and stop the assailant it is generally conclusive that they believe from the appearances that violence would be done. The rule as to the attempted violence has been stated thus: "Neither a purpose to make an assault, nor any amount of preparation for doing so, will constitute an assault, unless followed by some hostile demonstration against the person toward whom the purpose is entertained."³⁰ So it has been said that "it is indispensable to the offense that violence to the person be either offered, menaced or designed."³¹ The Supreme Court of Vermont, after quoting many definitions of assault from text writers and courts, concluded under the circumstances of the particular case in hand, saying: "Following the angry controversy of words, was a threatening movement in close proximity, accompanied by violent language in the nature of a threat, and by a much larger and more powerful man than the plaintiff; and the demonstration caused the plaintiff to fear violence."³² While an assault is held to be an attempt or offer, by force

²⁹ State v. Blackwell, 9 Ala. 79; Johnson v. State, 43 Tex. 576; Lawson v. State, 30 Ala. 14; Johnson v. State, 35 Ala. 363; Simpson v. State, 59 Ala. 1; People v. Yslas, 27 Cal. 630; Brown v. State, 95 Ga. 481, 20 S. E. 495; Hollister v. State, 156 Ind. 255, 59 N. E. 847; State v. Davis, 1 Ired. L. (N. Car.) 125; Higginbotham v. State, 23 Tex. 574; Johnson v. State, 43 Tex. 576; Berkeley v. Commonwealth, 88 Va. 1017, 14 S. E. 916.

³⁰ State v. Painter, 67 Mo. 84; Cutler v. State, 59 Ind. 300; Klein v. State, 9 Ind. App. 365, 36 N. E. 763.

³¹ People v. Bransby, 32 N. Y. 525.

³² Bishop v. Ranney, 59 Vt. 316, 7 Atl. 820.

and violence to do a corporal injury to another, the element of self defense must not be overlooked. However, if the proof should show that such an attempt or offer was in self defense the offense would not be established.³³

§ 2829. Drawing firearms.—With reference to a drawing of a firearm in order to constitute the assault, it is only necessary to show that the gun or other weapon was intended to be used immediately; and that there was the ability, with reference to distance, to inflict injury with the gun. But it is not necessary to show that the gun was actually pointed at the person, that it was cocked, or a trigger pulled. On this subject one court has said: "The law has not established, as a criterion in determining an attempt that the gun must be presented, or aimed, or the lock pulled back, or trigger of a rifle sprung, or any other stage in the series of acts that may be performed in committing an assault. It is sufficient, that there be an act done, indicating an intention to commit a battery immediately, coupled with the ability to do it."³⁴ It was held in one case that where the evidence showed that the assault consisted in shooting at another it was not necessary to prove that the bullet went in the direction of the person shot at, as the criminality of the act and the guilt of the accused did not depend on the accuracy of the aim.³⁵ On the question that it is not necessary that the gun or pistol be actually drawn and pointed at the prosecuting witness the Supreme Court of California say: "The prisoner put himself in a position to use the weapon in an instant having only to elevate the pistol and fire, at the same time declaring his intention to do so, unless the prosecutor would leave the ground . . . when the party draws the weapon, although he does not directly point it at the other, but holds it in such a position as enables him to use it before the other party could de-

³³ State v. Wyatt, 76 Iowa 328, 41 N. W. 31.

³⁴ Higginbotham v. State, 23 Tex. 574; Bell v. State, 29 Tex. 492, 494; Burton v. State, 3 Tex. App. 408; Cato v. State, 4 Tex. App. 87; Johnson v. State, 14 Tex. App. 306; Beach v. Hancock, 27 N. H. 223; People v. Ryan, 27 N. Y. St. 916, 28 N. Y. St. 489, 8 N. Y. S. 241, 369; People v. Connor, 25 N. Y. St. 138, 6 N. Y. S. 220; Bryant v. State, 7

Wyo. 311, 51 Pac. 879, 56 Pac. 596; Justice v. Phillips, 7 Ky. L. R. 439; State v. Lightsey, 43 S. Car. 114, 20 S. E. 975; State v. Epperson, 27 Mo. 255; State v. Taylor, 20 Kans. 643; People v. Morehouse, 25 N. Y. St. 294, 6 N. Y. S. 763.

³⁵ State v. Hunt, (R. I.) 54 Atl. 773; Domingues v. State, 35 Tex. Cr. App. 973, 40 S. W. 981; State v. Baker, 20 R. I. 275, 38 Atl. 653.

fend himself, at the same time declaring his intention to use it against the other, the jury are fully warranted in finding that such was his intention."³⁶ Some Texas cases have seemingly attempted to draw a very fine distinction between the threatened use of a gun and the acts of the accused which were deemed indicative of preparation merely, rather than of an attempt or purpose to inflict immediate injury.³⁷

§ 2830. **Pointing firearms necessary.**—But a class of cases holds that in order to constitute an assault with a gun or pistol it is necessary that the proof show two things: (1) That the weapon was actually presented; (2) that it was so presented within the distance to which the gun or pistol might do execution.³⁸ This class of cases establishes the rule that the holding or drawing of a gun or pistol without presenting it or pointing it toward the person or cocking it is not an assault.³⁹ So where a person drew a revolver and discharged it near the person complaining without any intention of injuring the complainant but for the purpose of frightening him only, it was held that this did not constitute an assault.⁴⁰ But it has been held that the raising and pointing of a deadly weapon at another is an assault; and that when an offer or attempt to strike is made with a deadly weapon the person using it will not be permitted to say that he did not intend to commit any personal violence.⁴¹ One court has held, however, that as a matter of law the pointing of a pistol by one person at another is not of itself an assault, but that it may or may not be according to the attending circumstances; and the attending circumstances must be such as to show that there was an intent coupled with the ability to do the harm, or that the other party had a right so to believe from the facts before him.⁴² And in one English case where the accused attempted to shoot a person with a gun properly loaded, but it appeared from the evidence that the priming was so damp that the gun did not go off, yet it was held not to be

³⁶ *People v. McMakin*, 8 Cal. 547.

³⁷ *Johnson v. State*, 43 Tex. 576; *Cato v. State*, 4 Tex. App. 87; *Young v. State*, 7 Tex. App. 75.

³⁸ *Tarver v. State*, 43 Ala. 354; *Clements v. State*, 50 Ala. 117; *Malone v. State*, 77 Miss. 812, 26 So. 968.

³⁹ *Lawson v. State*, 30 Ala. 14; *Johnson v. State*, 35 Ala. 363; *Clem-*

ents v. State, 50 Ala. 117; *Tarver v. State*, 43 Ala. 354; *Simpson v. State*, 59 Ala. 1; *Chapman v. State*, 78 Ala. 463.

⁴⁰ *Degenhardt v. Heller*, 93 Wis. 662, 68 N. W. 411.

⁴¹ *State v. Myerfield*, 61 N. Car. 108.

⁴² *Richels v. State*, 1 Sneed (Tenn.) 606.

an assault because the rifle "proved not to be so loaded as to be able to be discharged."⁴³

§ 2831. Drawing unloaded gun—Not an assault.—A class of cases and certain law writers have adopted the rule that a person who draws or points a gun or pistol at another person within shooting or executing distance, although accompanied by threats of an intention to shoot, and even where the person at whom it is pointed believes at the time that the gun or other weapon was loaded, is not liable in an action for criminal assault where the proof shows that such gun or weapon was in fact not loaded.⁴⁴ This rule is evidently based on two theories: (1) The question of intent; (2) and the question of the present ability. If the question of intent is the controlling one in such cases, assuming the parties to be within execution distance, then it is apparent that no violence could be inflicted by the unloaded gun. And this theory is strengthened when taken in connection with the rule requiring present ability, as it is evidence that there would be no present ability from the attempted or threatened use of an unloaded gun.

§ 2832. Drawing unloaded gun—An assault.—But some well considered cases incline to the view that it is not so much the actual present ability as it is the apparent danger or the outward demonstration from the standpoint of the person assailed. This rule is applied in the case of presenting or pointing an unloaded gun at another who believes it to be loaded. In speaking of this situation the Supreme Court of Arkansas say: "According to this view, if A menacingly point at B an unloaded gun, which, however, B believes to be loaded and thereby put in fear of immediate bodily injury, A is guilty of an indictable assault."⁴⁵ The Supreme Court of Iowa, after review-

⁴³Reg. v. James, 1 Car. & Kir. App. 232; United States v. Hand, 2 Wash. (U. S.) 435; Reg. v. St.

⁴⁴Chapman v. State, 78 Ala. 463; George, 9 Car. & P. 483; Blake v. Vaughan v. State, 3 Sm. & M. Barnard, 9 Car. & P. 626; Klein v. (Miss.) 553; Beach v. Hancock, 27 State, 9 Ind. App. 365, 36 N. E. 763.

N. H. 223; State v. Cherry, 11 Ired. ⁴⁵Pratt v. State, 49 Ark. 179; L. (N. Car.) 475; State v. Godfrey, State v. Shepard, 10 Iowa 126; 17 Ore. 300, 20 Pac. 625; Crow v. Commonwealth v. White, 110 Mass. State, 41 Tex. 468; McKay v. State, 407; State v. Smith, 2 Humph. 44 Tex. 43; Caldwell v. State, 5 (Tenn.) 459; Robertson v. State, 2 Tex. 18, 20; Burton v. State, 3 Tex. Lea (Tenn.) 239; State v. Herron, App. 408; Forrest v. State, 3 Tex. 12 Mont. 230, 29 Pac. 819; Beach v.

ing the authorities on the subject, said: "If the question were governed solely by the intent of the defendant, such an act would not be considered as amounting to an assault, and on the other hand, if it were governed by the probable and natural effect on the person aimed at, or by the tendency of the act to induce a breach of the peace, it would properly be regarded as such. After viewing the question in its various lights, we are inclined to hold with those who regard it as an assault, where the person aimed at does not know but that the gun is loaded, or has no reason to believe that it is not."⁴⁶ So it is held that "no specific intent is necessary to constitute the crime under this statute other than such as may be embraced in the act of making an assault with a dangerous weapon. This simply embraces the intentional and unlawful use of a dangerous weapon, by means of which an assault is committed with such weapon upon the person of another."⁴⁷

§ 2833. Unloaded gun—Civil and criminal assault.—There seems to have been a different rule established in civil and criminal cases with respect to the liability for an assault with an unloaded gun. The cases holding that the act constitutes a criminal assault would with perfect consistency hold that there was a civil liability. The cases adopting the contrary rule seem to think it necessary to recognize a distinction between such assaults in criminal prosecutions and in civil actions for damages. The reasoning adopted by one writer at least was that "if intentionally frightening a person's animals with a gun gives him a right of action, a fortiori should he have an action against any one who in this manner intentionally frightens him. It cannot be doubted that in such cases an action lies, and the act done may with propriety enough be called an actionable assault, but it does not therefore follow that it is an indictable assault."⁴⁸ The Supreme Court of New Hampshire has fully discussed the question in a civil action: but it made no distinction between civil and criminal assaults. In speaking on the subject generally the court said: "One of the most important objects to be attained by the enactment of laws and the institutions of civilized society is, each of us shall feel secure

Hancock, 27 N. H. 223; Reg. v. Hannam v. Mockett, 2 B. & C. 934; James, 1 Car. & Kir. 530. Carrington v. Taylor, 11 East 571;

⁴⁶ State v. Shepard, 10 Iowa 126. Ibottson v. Peat, 3 H. & C. 644;

⁴⁷ State v. Godfrey, 17 Ore. 300, Keble v. Hickringill, 11 Mod. 74; 301, 20 Pac. 625. Keeble v. Hickeringill, 11 Mod. 130,

⁴⁸ 2 Green Cr. Law, note 271, 274; 3 Salk. 9.

against unlawful assaults. Without such security society loses most of its value. Peace and order and domestic happiness, inexpressibly more precious than mere forms of government, cannot be enjoyed without the sense of perfect security. We have a right to live in society without being put in fear of personal harm. But it must be a reasonable fear of which we complain. And it surely is not unreasonable for a person to entertain a fear of personal injury, when a pistol is pointed at him in a threatening manner, when, for aught he knows, it may be loaded, and may occasion his immediate death. The business of the world could not be carried on with comfort if such things could be done with impunity."⁴⁹

§ 2834. Drawing gun—Burden of proof as to being loaded.—Out of this conflict of cases on the question of whether or not the drawing or pointing of a loaded or unloaded gun is sufficient to constitute an assault, grows the question of the burden of proving whether or not the gun was loaded. On the trial of a case where a charge of an assault committed by pointing a gun or pistol at another person, the question is, must the state prove as a part of its original case that the weapon was loaded? The courts holding that the drawing or pointing of an unloaded gun at another constitutes an assault would not require the state to prove the condition of the gun, neither would they ordinarily permit the accused to show that the gun was not loaded as a matter of defense. The other class of cases it seems establishes the rule that the burden is on the defendant to show that the gun was not loaded.⁵⁰ It seems to be the rule that where a person draws and points a gun toward another within shooting distance, accompanied by a threat to shoot or to do other violent injury, it will be presumed that the gun was loaded.⁵¹ A few cases, however, have held that the burden is on the state to show that the gun or pistol under such circumstances was loaded, and that no inference on that question can be drawn from the fact that an attempt was made to use the weapon as if it were in fact loaded.⁵²

⁴⁹ *Beach v. Hancock*, 27 N. H. 223. The court makes no distinction between civil and criminal liability.

⁵⁰ *State v. Herron*, 12 Mont. 230, 29 Pac. 819; *State v. Cherry*, 11 Ired. L. (N. Car.) 475; *Caldwell v. State*, 5 Tex. 18, 20; *Crow v. State*, 41 Tex. 468; *Burton v. State*, 3 Tex. App. 408.

⁵¹ *Keefe v. State*, 19 Ark. 190, 192; *State v. Herron*, 12 Mont. 230, 29 Pac. 819; *Beach v. Hancock*, 27 N. H. 223; *Richels v. State*, 1 Sneed (Tenn.) 606.

⁵² *State v. Napper*, 6 Nev. 113; *State v. Swails*, 8 Ind. 524; *Klein v. State*, 9 Ind. App. 365, 36 N. E. 763; *Henry v. State*, 18 Ohio 32.

Assault and battery.

§ 2835. **Definition.**—An assault and battery may be regarded or defined as the completion or culmination of an assault. The assault is usually considered as a part of or as being included in the battery or the assault and battery. There may be an assault under the rules and definitions heretofore given, without a battery; but it is evident that there can be no battery without an assault.⁵³ The various statutes defining this offense usually embody the common law idea of assault and battery. According to the common law the least touching of the person of another in anger was considered a battery. The reason given for this was that the law could not draw the line between different degrees of violence, and consequently it totally prohibited the lowest degree of any violence.⁵⁴ For these reasons a charge of unlawful beating is sufficiently sustained by proof of the least unlawful touching of the person of another in anger. The unlawful beating as used in such statutes is held to mean the same as the word battery at common law.⁵⁵ As sometimes expressed: "A battery is defined to be the wilful touching of the person of another by the aggressor or by some substance put in motion by him."⁵⁶ The statutes of some of the states provide in substance that any person who in a rude, insolent and angry manner shall unlawfully touch another, shall be deemed guilty of an assault and battery. Under such a definition it has been held that the proof must show at least three things: (1) The touching of the person of another; (2) such touching must be unlawful; (3) the unlawful touching must be either in a rude or an insolent, or an angry manner. Proof that it was done in either manner is sufficient. But it is held to be insufficient to charge and prove only that the touching was unlawfully done.⁵⁷ So

⁵³ Norton v. State, 14 Tex. 387; Fitzgerald v. Fitzgerald, 51 Vt. 420; Sweeden v. State, 19 Ark. 205; State Twogood, 7 Iowa 252; State v. Cody, 94 Iowa 169, 62 N. W. 702; Furnish v. Commonwealth, 14 Bush (Ky.) 180; Johnson v. State, 17 Tex. 515; Commonwealth v. Brungess, 23 Pa. Co. Ct. 13; see, Vol. III, Ch. 83.

⁵⁴ Russell Crimes, 1020; 2 Bishop Cr. Law, § 72; Hunt v. People, 53 Ill. App. 111; Foster v. State, 25

Tex. App. 543, 8 S. W. 664; State v. Cody, 94 Iowa 169, 62 N. W. 702.

⁵⁵ 3 Blackstone Comm. 120; Hunt v. People, 53 Ill. App. 111; Goodrum v. State, 60 Ga. 509; Norton v. State, 14 Tex. 387.

⁵⁶ Wescott v. Arbuckle, 12 Bradf. (Ill. App.) 580; Razor v. Kinsey, 55 Ill. App. 605.

⁵⁷ Howard v. State, 77 Ind. 401; State v. Philley, 67 Ind. 304; McCulley v. State, 62 Ind. 428; McDon-

of accident.⁶⁷ But notwithstanding this rule requiring proof of intent it has been held that where it appeared that the accused attempted to commit an assault and battery upon another person but accidentally struck and injured a bystander, he was guilty of an assault and battery.⁶⁸

§ 2839. Intent not essential to the crime.—But some cases hold that in actions for simple assault and battery the intent is not of the essence of the crime. That the only proof required is to show that the defendant committed the act or set in motion the force which resulted in the injury though it may have been done without any intent to injure.⁶⁹ This is the rule where the statute does not make the specific intent to wound or inflict grievous bodily harm an ingredient of the offense.⁷⁰

§ 2840. Intent—Presumption.—From the difficulty of proving the specific intent the law very generously presumes the existence of the intent from certain acts or the result of such acts. The rule on this subject at common law was, that “when the injury is caused by violence to the person, the intent to injure is presumed, and it rests with the person inflicting the injury to show accident or innocent intention.”⁷¹ So it was held sufficient to show that the accused by force poured, or attempted to pour upon the person of another, a mixture of spirits of turpentine and pepper.⁷²

§ 2841. Intent—Inferred from circumstances.—While it is incumbent upon the state to prove the intent, yet the law, recognizing the difficulty of proving mental states, does not require proof of such intent by direct evidence, but it may be established by proof of such facts and circumstances from which the intent may naturally or reasonably be inferred. One court very aptly stated the rule thus: “But it is generally true that the state is not expected and cannot be required to make proof of felonious intent, as a fact, by direct and positive evidence; for as a general rule, men who do or commit acts do not proclaim in public places the intent with which such acts are done. If the state were required to make direct and positive proof

⁶⁷ Vincent v. Stinehour, 7 Vt. 62.

⁷⁰ State v. Broadbent, 19 Mont.

⁶⁸ McCay v. State, 32 Tex. Cr. App. 467, 48 Pac. 775.
233, 22 S. W. 974.

⁷¹ Evans v. State, 25 Tex. Sup.
303.

⁶⁹ Hill v. State, 63 Ga. 578.

⁷² Murdock v. State, 65 Ala. 520.

of the felonious intent which characterizes the act done as a public offense, the result would be that many persons, charged and guilty of public crimes, would go acquit 'unwhipt of justice.' Therefore all that the state is required to do in such cases is to introduce such evidence on the trial of the cause as will satisfy the triers of the facts, whether court or jury, beyond a reasonable doubt, not only that the act was done by the defendant, but that it was done with the felonious intent charged in the indictment."⁷³ So it is held that the intent may be inferred from the act itself, and that in a certain class of cases no further proof of intent is required. But in some cases of simple assault and battery it is held that the intent will not be stretched beyond the result of the blow.⁷⁴ This rule that the intent or malice may be inferred from the act is very generally extended to the point of holding that the accused will not be permitted to overcome such inference by a statement that he did not intend any bodily injury or that he did the act in fun or sport. This rule applies especially in cases where persons are injured by the discharge of a gun or pistol for the purpose of frightening others.⁷⁵

§ 2842. *Injury to feelings.*—The courts generally adhere to the rule that in order to constitute an assault and battery there must be an unlawful touching in some manner prohibited by the statute. Some courts admitting this rule recognize that while there must be some physical act committed by the assailant yet the violence may be either to the person or to the feelings or mind. This rule was aptly stated by the Texas Court of Appeals as follows: "The use of any unlawful violence upon the person of another, with the intent to injure, is an assault and battery. From this, two acts must concur, one physical and the other mental,—the act and the accompanying intent. There must be a physical act done by the assailant, which takes effect upon the person of the party assailed. The slightest force is sufficient; the least touching of the person of another will suffice. The act done or force used which takes effect must be intended, otherwise it would be accidental and therefore not unlawful. To the intended act or force must be added the intent to injure the party assailed. The injury intended may be to the feelings or mind, as well

⁷³ Padgett v. State, 103 Ind. 550, 33 N. W. 30; People v. Miller, 91 3 N. E. 377. Mich. 639, 52 N. W. 65.

⁷⁴ People v. Ross, 66 Mich. 94, 96, ⁷⁵ Smith v. Commonwealth, 100 Pa. St. 324. See § 2818, et seq.

as to the person. The violence being used or the act being done, if the natural consequence of the act or violence is an injury, the law presumes this injury to have been intended, unless it be shown that the intention was innocent and not culpable. When an injury is actually inflicted upon the person, the presumption that it was intended obtains. If to the mind, or feelings, the act or violence used must in its nature be calculated to wound or injure before the intention to injure will be presumed. When it is sought to convict for an injury to the feelings or mind, the character of a person assaulted with all of the surrounding facts become of vital importance in determining whether there was an intent to injure.”⁷⁶

§ 2843. Parent—Assault and battery on child.—The courts of all civilized countries recognize that parents in the exercise of the rightful and natural authority have the power to administer correction and chastisement in the punishment of their children. But courts are equally zealous in guarding children against punishment that is unreasonable or inhuman and cruel. The general rule is well stated by the Indiana court as follows: “The law is well settled that a parent has the right to administer proper and reasonable chastisement to his child without being guilty of assault and battery; but he has no right to administer unreasonable or cruel and inhuman punishment. If the punishment is excessive, unreasonable or cruel, it is unlawful. The mere fact that the punishment was administered by the appellant upon the person of his own child will not screen him from criminal liability. Whether or not the punishment inflicted in this case was excessive or cruel was a question for the jury.”⁷⁷

§ 2844. Teacher—Assault and battery on pupil.—The law generally concedes to a teacher the right to punish the pupil but the law holds that such punishment must be for the correction of the pupil and must be in moderation, with the proper motive, and not from vindictiveness nor in the spirit of malice. When the proof shows that

⁷⁶ *Donaldson v. State*, 10 Tex. App. 807; *Rutherford v. State*, 13 Tex. App. 92.

⁷⁷ *Hornbeck v. State*, 16 Ind. App. 484, 45 N. E. 620; *Hinkle v. State*, 127 Ind. 490, 26 N. E. 777; *Fletcher v. People*, 52 Ill. 395; *Smith v. Slocum*, 62 Ill. 354; *Hutchinson v.*

Hutchinson, 124 Cal. 677, 57 Pac. 674; *Neal v. State*, 54 Ga. 281; *State v. Bitman*, 13 Iowa 485; *Commonwealth v. Coffey*, 121 Mass. 66; *State v. Alford*, 68 N. Car. 322; *State v. Jones*, 95 N. Car. 588; *Johnson v. State*, 2 Humph. (Tenn.) 282.

the punishment inflicted was immoderate or unreasonable, the teacher is held to be criminally liable. This rule was stated by the Massachusetts court thus: "If, in inflicting punishment upon his pupil he went beyond the limit of moderate castigation, and, either in the mode or degree of correction was guilty of any unreasonable and disproportionate violence or force, he was clearly liable for such in a criminal prosecution." It was held in the same case that a wrongful intent may be inferred from proof of the unreasonable and excessive use of force.⁷⁸ And on the same subject the Supreme Court of Indiana say: "To support a charge of an assault and battery it is necessary to show that the act complained of was intentionally committed. But in the case of the chastisement of a pupil, the intent may be inferred from the unreasonableness of the method adopted or the excess of force employed, but the burden of proving such unreasonableness and such excess rests upon the state. In such a case in addition to the general presumption of his innocence, the teacher has the presumption of having done his duty in support of his defense."⁷⁹

§ 2845. Assault and battery by parent—Presumption and burden of proof.—In seeking to establish the charge of assault and battery against a parent or against one who stands in loco parentis, a different rule as to the proof prevails. No criminal intent is inferred from the fact of the punishment of a child by a parent or teacher. On the contrary the law presumes the absence of any criminal intent, and that he has done his duty.⁸⁰ And in addition to this it is presumed that the chastisement was proper and the punishment moderate.⁸¹ On the question of the burden of proof in such cases and the presumption, the Supreme Court of Tennessee say: "We think the proper rule is, that where the relation of schoolmaster and scholar,

⁷⁸ Commonwealth v. Randall, 4 Vt. 102; State v. Burton, 45 Wis. Gray (Mass.) 36; Cooper v. McJunkin, 4 Ind. 290; Gardner v. State, 4 Ind. 632; Danenhoffer v. State, 69 Ind. 295; Vanvactor v. State, 113 Ind. 276, 15 N. E. 341; State v. Pendergrass, 2 Dev. & B. (N. Car.) 365; State v. Alford, 68 N. Car. 322; State v. Jones, 95 N. Car. 588; State v. Stafford, 113 N. Car. 635, 18 S. E. 256; State v. Rhodes, 61 N. Car. 453; Anderson v. State, 3 Head (Tenn.) 454; Hathaway v. Rice, 19

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⁷⁹ Vanvactor v. State, 113 Ind. 276, 15 N. E. 341; Fertich v. Michener, 111 Ind. 472, 11 N. E. 605; Lander v. Seaver, 32 Vt. 114.

⁸⁰ Vanvactor v. State, 113 Ind. 276, 15 N. E. 341.

⁸¹ Anderson v. State, 3 Head (Tenn.) 454; Turner v. State, 35 Tex. Cr. App. 369, 33 S. W. 972; Hathaway v. Rice, 19 Vt. 102.

parent and child, master and apprentice, or any similar relation, is established in defense of a prosecution of this sort, the legal presumption is, that the chastisement was proper; this must be rebutted by showing on the part of the state or the proof before the jury that it was excessive, or without any proper cause. To hold a parent bound to prove that he had good cause to whip his child, or be subject to a conviction upon indictment, would be monstrous. The same rule applies to the relation under consideration."⁸² "In order to convict a parent the state must show that he was inflicting immoderate punishment upon the girl."⁸³

§ 2846. Excessive punishment—What constitutes.—The question of the excessive cruelty of the punishment is to be left to the jury. But where the proof shows that the punishment, however severe, produced temporary pain only, and no permanent results, it is not necessarily inhuman and cruel or beyond parental authority and for the reformation of the child. But "any punishment therefore which may seriously endanger life, limb or health or shall disfigure the child, or cause any other permanent injury, may be pronounced in itself immoderate, as not only being unnecessary for, but inconsistent with, the purpose for which correction is authorized."⁸⁴

§ 2847. Self-defense.—The rules of proof where the accused justifies his acts on the ground of self-defense are practically the same in cases of assault and battery as those in higher grades of offenses. These rules will be given more fully and the authorities more generally collected in subsequent chapters. The general rule is that when a person is without fault, is in a place where he has a right to be, and is assaulted, he has a right to defend himself against the threatened or attempted assault. As sometimes stated he has the right to repel force by force, and this he may do without retreating. If the proof shows that in the reasonable exercise of this right he inflicted bodily injury upon his assailant he is justified or excusable.⁸⁵ This right

⁸² *Anderson v. State*, 3 Head (Tenn.) 454; *Johnson v. State*, 2 Humph. (Tenn.) 282; *State v. Pendergrass*, 2 Dev. & B. (N. Car.) 365; *State v. Harris*, 63 N. Car. 1; *Commonwealth v. Randall*, 4 Gray (Mass.) 36.

⁸³ *Turner v. State*, 35 Tex. Cr. App. 369, 33 S. W. 972.

⁸⁴ *State v. Alford*, 68 N. Car. 322; *State v. Pendergrass*, 2 Dev. & B. (N. Car.) 365; *State v. Jones*, 95 N. Car. 588; *State v. Stafford*, 113 N. Car. 635, 18 S. E. 256.

⁸⁵ *Miller v. State*, 74 Ind. 1; *Presser v. State*, 77 Ind. 274; *McDermott v. State*, 89 Ind. 187; *Mannahan v. State*, 18 Ind. App. 297, 47 N. E.

of self-defense is given to one who is himself without fault, and in order to invoke the benefit of the rule he must show that he was without fault.⁸⁶ In criminal cases proof of the facts constituting self-defense or all matters which justify or even go in mitigation of the assault and battery charged may generally be given in evidence under the plea of not guilty.⁸⁷

§ 2848. Self-defense—Excessive force.—This right to invoke the rule of self-defense is subject to another exception. The term itself implies the defense of one's person from a contemplated or attempted assault and this is generally the limit of the right; the rule cannot be extended beyond the natural and inherent right that a person has to protect himself from harm or violence. For these reasons a person when assaulted cannot, under his pretended right of self-defense, use any more force than is reasonably necessary to protect himself. He will not be permitted under the guise of self-defense to administer punishment to his assailant; to claim the benefit of this right he must content himself with having successfully repelled his adversary. And if the proof shows that he did more, or if he followed up his assailant and administered apparently needed punishment, or if it is shown that he used excessive force under all the circumstances he will be criminally liable for assault and battery.⁸⁸ The law is not over precise, however, in the application of this rule of excessive force on the part of the person assaulted. It permits him to act upon appearances and indulges the inferences that he may draw from the acts, conduct and appearance of his assailant at the time. Hence, if the proof shows that under all the circumstances the means used and the manner of the use in resisting were not disproportioned to the character of

1076; *State v. Hays*, 23 Mo. 287; *Hor. & Th. Cas.* 492.

⁸⁶*Kingen v. State*, 45 Ind. 518; *Wall v. State*, 51 Ind. 453; *Runyan v. State*, 57 Ind. 80; *Presser v. State*, 77 Ind. 274; *Story v. State*, 99 Ind. 413.

⁸⁷*People v. Shanley*, 30 Misc. (N. Y.) 290, 63 N. Y. S. 389; *State v. Elliott*, 11 N. H. 540.

⁸⁸*Mitchell v. State*, 41 Ga. 537; *Berry v. State*, 105 Ga. 683, 31 S. E. 592; *Woodman v. Howell*, 45 Ill. 367; *Ogden v. Claycomb*, 52 Ill. 365;

Gizler v. Witzel, 82 Ill. 322; *Illinois &c. Co. v. Waznius*, 101 Ill. App. 535; *Steiner v. People*, 187 Ill. 244, 58 N. E. 383; *Adams v. Waggoner*, 33 Ind. 531, 533; *Dole v. Erskine*, 35 N. H. 503; *Castner v. Sliker*, 33 N. J. L. 95, 99; *Stockton v. State*, 25 Tex. 772, 776; *Chambers v. Porter*, 5 Coldw. (Tenn.) 273, 282; *State v. Wood*, 1 Bay (S. Car.) 351; *Commonwealth v. Bush*, 112 Mass. 280; *State v. Gibson*, 10 Ired. L. (N. Car.) 214.

the assault made or attempted, he will be excusable.⁸⁹ This rule on the question of the use of excessive force has been aptly stated by the New Hampshire Supreme Court thus: "The self-defense must be regulated by the nature, degree and design of the attack, and the repelling force must go no farther than is necessary to prevent the mischief intended by the aggressor."⁹⁰

§ 2849. Self-defense—Duty of assailant.—The right of self-defense may be extended to the original assailant under certain circumstances. But before this can be done the party who wrongfully and unlawfully begins a contest must place himself clearly in the right. Under such circumstances to invoke the right to the rule of self-defense he must prove that after having begun the assault he has made an effort in good faith to withdraw.⁹¹ In order to invoke this rule the person who wrongfully or unlawfully provokes a quarrel and is himself the aggressor and enters upon a personal combat, when assaulted or repelled by his adversary, cannot justify the use of a dangerous or deadly weapon without first showing that he withdrew or attempted to withdraw in good faith from the contest.⁹²

§ 2850. Defense of family.—This right of self-defense is not limited to the person assailed. The right extends equally to the defense of a man's family, his possession or his property. In one case it was said: "The defense of one's self, husband, wife, child, parent, mother or servant is, under certain circumstances, a natural right."⁹³

§ 2851. Defense of possession.—This right to defend is granted to the person in the mere possession of property, and the rule is that the bare possessor of a thing has a right forcibly to repel any forcible attempts to take it from him. He has the right to use as much force as is necessary to prevent his exclusion from the use of the property or its forcible or illegal removal.⁹⁴

⁸⁹ Pease v. State, 13 Tex. App. 18; State v. Hill, 4 Dev. & B. (N. Car.) 491, Hor. & Th. Cas. 199.

⁹⁰ State v. Elliott, 11 N. H. 540.

⁹¹ Hittner v. State, 19 Ind. 48, Hor. & Th. Cas. 236; Presser v. State, 77 Ind. 274; Story v. State, 99 Ind. 413; Commonwealth v. Riley, Hor. & Th. Cas. 155; State v. Hill, 4 Dev. & B. (N. Car.) 491, Hor. & Th. Cas. 199;

Stoffer v. State, 15 Ohio St. 47, Hor. & Th. Cas. 213.

⁹² Presser v. State, 77 Ind. 274; Barnett v. State, 100 Ind. 171.

⁹³ State v. Elliot, 11 N. H. 540; Curtis v. Hubbard, 1 Hill (N. Y.) 336; see. Vol. III, § 1701.

⁹⁴ Roach v. People, 77 Ill. 25; Commonwealth v. Kennard, 8 Pick. (Mass.) 133; Commonwealth v.

§ 2852. **Defense of property.**—For the same reasons a person has a right to defend his property and the same rules govern as to the degree of force. An intruder may be ordered out of the house or off of the premises of another; but the owner has no right to expel him by force until gentler means have failed. But if the intruder fails or refuses to leave, the owner of the property or premises may then use as much force as is requisite for the purpose of ejecting him. But, as in other cases, no greater force than is necessary to expel the intruder can be employed.⁹⁵ Where the defense is a justification on the ground of possession or ownership, it is proper for the defendant to prove that he was in the possession of the property, or that he owned the premises on which the alleged assault and battery were committed, and that he did the acts complained of in defense of the possession of such property or premises.⁹⁶ But it must be remembered that the proof must show possession; and it has been held that the owner would not be justified in committing an assault and battery for the purpose of reducing his right of ownership to actual possession.⁹⁷

§ 2853. **Degree of force.**—The rule governing the degree of force to be used applies equally to persons and property. The rule has been thus stated: "The right to property of all kinds may be forcibly defended when it is forcibly attacked, and that the degree of force to be used is to be measured not by the value of the article, but by the degree of force used in the attack."⁹⁸ As stated in an early California case: "The owner of the property and in possession of the same had a right to use such force as was necessary to prevent a forcible trespass."⁹⁹

§ 2854. **Degree of force—Distinction.**—There seems to be a distinction in the degree of force used for the purpose of protecting

Power, 7 Metc. (Mass.) 596; Commonwealth v. Crotty, 10 Allen (Mass.) 403; People v. Payne, 8 Cal. 341; Harrington v. People, 6 Barb. (N. Y.) 607; State v. Miller, 12 Vt. 437. 590; People v. Smith, 24 Barb. (N. Y.) 16; Corey v. People, 45 Barb. (N. Y.) 262; Weaver v. Bush, 8 Term R. 78; see, Vol. III, § 1699.

⁹⁵ 1 Wharton Cr. Law, §§ 100, 506; Commonwealth v. Clark, 2 Metc. (Mass.) 23; Commonwealth v. Power, 7 Metc. (Mass.) 596; Commonwealth v. Dougherty, 107 Mass. 243; Parsons v. Brown, 15 Barb. (N. Y.)

⁹⁶ Harrington v. People, 6 Barb. (N. Y.) 607.

⁹⁷ Parsons v. Brown, 15 Barb. (N. Y.) 590.

⁹⁸ 1 Wharton Cr. Law, § 100.

⁹⁹ People v. Payne, 8 Cal. 341; People v. Flanagan, 60 Cal. 2; Johnson v. Patterson, 14 Conn. 1.

doer. In such case a recapture of the property is permitted by the individual, when made only with the reasonable exercise of power which the occasion demands, and when limited and controlled by the urgency of the necessity compelling to this course."¹⁰⁸

¹⁰⁸ State v. Elliot, 11 N. H. 540; v. Higgs, 10 C. B. N. S. 713; Bonner Sterling v. Warden, 51 N. H. 217; v. State, 97 Ala. 47, 12 So. 408. Mills v. Wooters, 59 Ill. 234; Blades

CHAPTER CXXXIV.

BIGAMY.

Sec.	Sec.
2858. Scope of Chapter.	2867. First husband or wife living —Presumptions.
2859. Definition.	2868. Absence of husband or wife— Effect and burden.
2860. Jurisdiction—Proof.	2869. First husband or wife living —Distinction in statutes.
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2862. First marriage—Method of proof.	2871. Second marriage in good faith —No defense.
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2865. Second marriage—Presump- tion.	2874. First and second wives as witnesses.
2866. First husband or wife living —Proof.	

§ 2858. **Scope of chapter.**—Bigamy is made a crime by statute in perhaps every state of the United States. There is great unanimity in the several statutes as to the crime itself, but some differences in the statutes with reference to subsequent cohabitation and other attending matters. It is not within the scope of this work, nor is it at all practical to supply rules of proof adapted to the various statutes of the several states. The purpose here is to give the general rules of proof that may apply to the statutes generally.

§ 2859. **Definition.**—For reasons suggested in the preceding section it is not possible to give a definition of bigamy that will fully conform to the various statutes of the several states; but the essential elements of the crime are so generally recognized that the common definition is practically of universal application. The prevailing idea in the definition given by Mr. Blackstone is very generally adhered to when he defines bigamy as that “which properly signifies being twice married, but is more justly denominated polygamy, or having a plurality of wives at once. Such second marriage, living the

former husband or wife, is simply void, and the mere nullity, by the ecclesiastical law of England; and yet the legislature has thought it just to make it a felony, by reason of its being so great a violation of the public economy and decency of a well-ordered state.”¹ A writer on criminal law says of it: “Bigamy, in its proper signification, is said to mean only being twice married, and not having a plurality of wives at once.”² As defined by some statutes, “any person being married who, during the life of the former husband or wife, shall marry another person in this state, or, if the marriage with such other person take place out of the state, shall thereafter cohabit with such other person in this state,” shall be deemed guilty of bigamy, etc.³ Other statutes say of it: “If any person, who has a former husband or wife living, shall marry another person or shall continue to cohabit with such second husband or wife, he or she shall, etc., be deemed guilty of polygamy,” etc.⁴ The Arkansas Supreme Court briefly says of bigamy: “It is the marrying, by a person who has a husband or wife living, that constitutes the offense under the statute.”⁵ In defining bigamy the Supreme Court of Pennsylvania say: “Polygamy is the proper term to describe the offense we have been discussing; but by long usage bigamy has come to be understood in law to be the state of a man who has two wives, or a woman who has two husbands at the same time.”⁶ Some statutes have another and very important element where they provide that “the offense of bigamy consists in the wilful contracting a second marriage, knowing the former marriage to be subsisting.”⁷

§ 2860. Jurisdiction—Proof.—It is a fundamental law of procedure in criminal cases that the proof must bring the alleged crime within the jurisdiction of the court. Under this rule in prosecutions for bigamy where the statutory offense consists in marrying another person while a former husband or wife is living, the evidence must

¹ 2 Blackstone Comm., 163.

² 1 Russell Crimes, 186, note a.

³ 3 Wharton Cr. Law, § 2623.

⁴ Finney v. State, 3 Head (Tenn.) 544; Johnson v. Commonwealth, 86 Ky. 122, 5 S. W. 365; Dotson v. State, 62 Ala. 141; State v. Nadal, 69 Iowa 478, 29 N. W. 451; State v. Johnson, 12 Minn. 476, 93 Am. Dec 252; Commonwealth v. Lucas, 158 Mass. 81, 32 N. E. 1033.

⁵ Scoggins v. State, 32 Ark. 205;

Halbrook v. State, 34 Ark. 511; State v. Hayes, 10 La. 352; Niece v. Territory, 9 Okla. 535, 60 Pac. 300; Commonwealth v. Grise, 11 Phila. (Pa.) 655; Murphy v. Ramsey, 114 U. S. 15, 5 Sup. Ct. 747; 2 Wharton Cr. Law, § 1682; Bishop Stat. Crimes, § 577.

⁶ Grise v. Commonwealth, 81 Pa. St. 428, 2 Wkly. No. Cas. 589.

⁷ Beggs v. State, 55 Ala. 108.

show, unless otherwise provided by statute, that the second marriage ceremony was performed within the county where the indictment was returned. Subsequent cohabitation in the same county or in another jurisdiction may be made an offense by statute, but it is not bigamy. "The criminal second marriage is an indispensable element of the statutory offense, and must be averred and proved."⁸

§ 2861. Validity of first marriage.—In prosecution for bigamy the state must prove both a prior and subsequent marriage beyond a reasonable doubt. The one fact that makes the second marriage criminal is that of an existing prior marriage which has not been dissolved either by death or divorce. The first marriage must not only be proved, but it must be made to appear that it was valid according to the laws of the state or country where celebrated.⁹ This general rule was more fully stated by the Supreme Court of Illinois: "To constitute the offense charged in this indictment it was incumbent on the prosecution to show, against the defendant, two successive marriages,—one legal and innocent, the other penal. Both must be actual. The first marriage must be valid and binding and a marriage in fact. Marriage with capacity and consent, proved by direct testimony, as by the evidence of witnesses who saw and heard the marriage celebration performed between the parties, or record evidence, with identification, would be evidence of actual marriage in fact."¹⁰ If the first marriage is illegal or void or has been dissolved for any reason there can be no conviction for bigamy.¹¹ A marriage void by

⁸ *Beggs v. State*, 55 Ala. 108; *Williams v. State*, 44 Ala. 24; *Brewer v. State*, 59 Ala. 101; *Walls v. State*, 32 Ark. 565; *State v. Johnson*, 12 Minn. 476; *Watson, In re*, 19 R. I. 342, 33 Atl. 873; *Finney v. State*, 3 Head (Tenn.) 544; *Keneval v. State*, 107 Tenn. 581, 64 S. W. 897; *People v. Mosher*, 2 Park. Cr. Cas. (N. Y.) 195; *United States v. Jernegan*, 4 Cranch (U. S.) 1; *State v. Cutshall*, 110 N. Car. 538, 15 S. E. 261; *State v. Palmer*, 18 Vt. 570; *Bishop Stat. Crimes*, §§ 587, 588.

⁹ *Parker v. State*, 77 Ala. 47; *McDeed v. McDeed*, 67 Ill. 545; *Canale v. People*, 177 Ill. 219, 52 N. E. 310; *Hull v. State*, 7 Tex. App. 593;

Weinberg v. State, 25 Wis. 370; *Bishop Stat. Crimes*, § 609.

¹⁰ *Hiler v. People*, 156 Ill. 511, 41 N. E. 181; *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. 737; *Hebblethwaite v. Hepworth*, 98 Ill. 126; *Port v. Port*, 70 Ill. 484; *Harmon v. Harmon*, 16 Ill. 85; *Lowery v. People*, 172 Ill. 466, 50 N. E. 165; *Lyman v. People*, 198 Ill. 544, 64 N. E. 974; *Lyman v. People*, 98 Ill. App. 386; *State v. Winkley*, 14 N. H. 480; *State v. Davis*, 109 N. Car. 780; 14 S. E. 55; *Hayes v. People*, 25 N. Y. 390.

¹¹ *Halbrook v. States*, 34 Ark. 511; *State v. Goodrich*, 14 W. Va. 834; 3 *Greenleaf Ev.*, § 208.

reason of non-age of the parties and not confirmed by cohabitation after arriving at the statutory age has been held to be insufficient to establish a subsequent marriage bigamous.¹²

§ 2862. First marriage—Method of proof.—The rules governing the proof of such first marriage, generally, are practically the same as those previously given in prosecutions for adultery.¹³ It has been held that “when the celebration of a marriage is once shown, the contract of marriage, the capacity of the parties, and every other fact necessary to the validity of a marriage will be presumed, until the contrary is shown.”¹⁴ So it has been held that the record of a decree granting a divorce from the first or lawful wife after the alleged second marriage, with evidence to identify the parties, is competent as proof of the marriage.¹⁵ So the silence of the accused in the face of a charge that his first wife was still living was held to be in the nature of an admission both of the former marriage and the fact of his knowledge or belief that the lawful wife was living.¹⁶ Where a marriage took place in a foreign country, followed by cohabitation, in the absence of proof of the laws of such country relating to the solemnization of marriages, it has been held that such marriages will be presumed to be legal.¹⁷

§ 2863. First marriage—Proof by admissions.—The courts are not unanimous on the rule as to whether or not in prosecutions for bigamy, as in prosecutions for adultery,¹⁸ the fact of the marriage can be sufficiently established by proof of admissions of the accused. But the great weight of authority and the better reasoning are in favor of the proposition that the fact of the marriage may be established by proof of such admissions. Some cases justify this holding on the theory that these admissions are equivalent to the proof by a party

¹² *Shaffer v. State*, 20 Ohio 1; but see, *People v. Slack*, 15 Mich. 193; *State v. Cone*, 86 Wis. 498, 57 N. W. 50. *Ferrie*, 26 Barb. (N. Y.) 177; *State v. Kean*, 10 N. H. 347; *State v. Clark*, 54 N. H. 456.

¹³ See Vol. IV, §§ 2799–2803; *Bishop Stat. Crimes*, § 610.

¹⁴ *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. 737; *Barber v. People*, 203 Ill. 543, 68 N. E. 93; *Strode v. Magowan*, 2 Bush (Ky.) 621; *People v. Calder*, 30 Mich. 85; *Fleming v. People*, 27 N. Y. 329; *Caujolle v.*

¹⁵ *Halbrook v. State*, 34 Ark. 511; *State v. Ashley*, 37 Ark. 403.

¹⁶ *State v. Plym*, 43 Minn. 385, 45 N. W. 848.

¹⁷ *Commonwealth v. Kenney*, 120 Mass. 387; but see, *People v. Lambert*, 5 Mich. 349.

¹⁸ See, Vol. IV, § 2802.

who was present and witnessed the ceremony. Other cases yield assent to the rule by holding that proof of such admissions in connection with proof of other circumstances is sufficient; while other cases assert that in the absence of local laws describing certain formalities and ceremonies to validate a marriage the fact may be proved by the admissions of the party.¹⁹ In an earlier case the Alabama court held that in such prosecutions the fact of marriage may be proved by cohabitation and confessions of the accused. And it was held that if the proof be full and satisfactory it was unnecessary to produce either the record, or the testimony of witnesses who were present.²⁰ By the common law consent followed by cohabitation constituted a valid marriage. Hence the rule is established that in states or countries where the common law is presumed to exist proof of admission of a marriage is the proof of a fact which may rest in parol only, and such admissions are competent evidence of the fact. In any event the admissions must be sufficient to prove the fact of a marriage beyond

¹⁹ *Williams v. State*, 54 Ala. 131; *Parker v. State*, 77 Ala. 47; *United States v. Tenney*, 2 Ariz. 127, 11 Pac. 472; *Halbrook v. State*, 34 Ark. 511; *Cook v. State*, 11 Ga. 53; *Murphy v. State*, 50 Ga. 150; *Arnold v. State*, 53 Ga. 574; *Dale v. State*, 88 Ga. 553, 15 S. E. 287; *McSein v. State*, 120 Ga. 175, 47 S. E. 544; *Jackson v. People*, 2 Scam. (Ill.) 231; *Tucker v. People*, 122 Ill. 583, 13 N. E. 809; *State v. Seals*, 16 Ind. 352; *Squire v. State*, 46 Ind. 459; *State v. Nadal*, 69 Iowa 478, 29 N. W. 451; *State v. Hughes*, 35 Kans. 626, 12 Pac. 28; *Commonwealth v. Jackson*, 11 Bush (Ky.) 679; *Cayford's Case*, 7 Me. 57; *Ham's Case*, 11 Me. 391; *State v. Hodgskins*, 19 Me. 155; *State v. Libby*, 44 Me. 469; *Commonwealth v. Holt*, 121 Mass. 61; *Commonwealth v. Dill*, 156 Mass. 226, 30 N. E. 1016; *Commonwealth v. Hayden*, 163 Mass. 453, 40 N. E. 846; *People v. Perriman*, 72 Mich. 184, 40 N. W. 425; *People v. Imes*, 110 Mich. 250, 68 N. W. 157; *State v. Armington*, 25 Minn. 29; *State v. Plym*, 43 Minn. 385, 45 N. W. 848; *State v.*

McDonald, 25 Mo. 176; *State v. Cooper*, 103 Mo. 266, 15 S. W. 327; *State v. Clark*, 54 N. H. 456; *State v. Wylde*, 110 N. Car. 500, 15 S. E. 5; *Wolverton v. State*, 16 Ohio 173; *Stanglein v. State*, 17 Ohio St. 453; *Forney v. Hallacher*, 8 S. & R. (Pa.) 159; *Greenwalt v. McEnelley*, 85 Pa. St. 352; *Commonwealth v. Henning*, 10 Phila. (Pa.) 209; *Commonwealth v. Murtagh*, 1 Ashm. (Pa.) 272; *State v. Medbury*, 8 R. I. 543; *State v. Gallagher*, 20 R. I. 266, 38 Atl. 655; *State v. Britton*, 4 McCord (S. Car.) 256; *State v. Hilton*, 3 Rich. L. (S. Car.) 434; *Bashaw v. State*, 1 Yerg. (Tenn.) 176; *Dumas v. State*, 14 Tex. App. 464; *State v. Abbey*, 29 Vt. 60; *Warner v. Commonwealth*, 2 Va. Cas. 95; *Oneale v. Commonwealth*, 17 Gratt. (Va.) 582; *Bird v. Commonwealth*, 21 Gratt. (Va.) 800; *Womack v. Tankersley*, 78 Va. 242; *State v. Goodrich*, 14 W. Va. 834; *Miles v. United States*, 103 U. S. 304; *Reg. v. Simonsto*, 1 Car. & Kir. 164.

²⁰ *Langtry v. State*, 30 Ala. 536.

a reasonable doubt.²¹ But another class of cases holds that evidence of cohabitation, reputation, etc., is not admissible, and that proof of admissions is not sufficient to establish the fact of a prior marriage, but it must be proved by direct evidence.²²

§ 2864. Second marriage—Proof establishes offense.—Under statutes which define the crime by simply providing in substance that any person who is now married shall take to himself or herself another husband or wife, while his or her former husband or wife is still alive, it is only necessary to prove in addition to the first marriage three things: (1) That the accused has a former husband or wife living: (2) the fact of the second marriage: (3) the identity of the parties. It is expressly held that proof of subsequent cohabitation is not required, nor is it necessary to show the consummation of the second marriage by any carnal act.²³ Of this rule the Alabama court say: "Cohabitation, consequent on the marriage, is not an ingredient of the offense. It is complete, when the second marriage, if valid, would be complete according to the law of the place in which it is formed. Public morals are violated, public policy is offended, and an illegal contract is made, when the rites are solemnized according to the forms of law. Then, if the prior marriage did not avoid, the relation of husband and wife would be formed, and all its incidents would attach. It is the vicious contract, the violation of public morals and policy, the law denounces and punishes."²⁴ It is no defense, however, to prove that the second marriage is void or prohibited by statute. It is the entering into the void or bigamous marriage

²¹ *Williams v. State*, 54 Ala. 131; *Parker v. State*, 77 Ala. 47.

²² *Clayton v. Wardell*, 4 N. Y. 230; *Eisenlord v. Clum*, 126 N. Y. 552, 562, 27 N. E. 1024; *People v. Humphrey*, 7 Johns. (N. Y.) 314; *Gahagan v. People*, 1 Park. Cr. Cas. (N. Y.) 378; *Clayton v. Wardell*, 5 Barb. (N. Y.) 214; *People v. Kelly*, 37 Hun (N. Y.) 160; *Dann v. Kingdom* 1 T. & C. (N. Y.) 492; *People v. Edwards*, 25 N. Y. S. 480; *State v. Roswell*, 6 Conn. 446; *State v. Armstrong*, 4 Minn. 335; *State v. Whaley*, 10 Rich. L. (S. Car.) 500;

Weinberg v. State, 25 Wis. 370; see, *Hayes v. People*, 25 N. Y. 390; *Willmet v. Harmer*, 8 Car. & P. 695.

²³ *Scoggins v. State*, 32 Ark. 205; *Beggs v. State*, 55 Ala. 108; *State v. Patterson*, 2 Ired. L. (N. Car.) 346; *Nelms v. State*, 84 Ga. 466, 10 S. E. 1087; *Glise v. Commonwealth*, 81 Pa. St. 428, 2 Wkly. No. Cas. 589; *State v. Johnson*, 12 Minn. 476, 93 Am. Dec. 252; *Reg. v. Bawm*, 1 Cox Cr. Cas. 33.

²⁴ *Beggs v. State*, 55 Ala. 108; *State v. Smiley*, 98 Mo. 605.

while the prior valid marriage exists that constitutes the gist of the offense.²⁵

§ 2865. Second marriage—Presumption.—One class of cases holds that every presumption must be indulged in favor of the validity of the second marriage; and it has been held that the ordinary presumption in favor of the continuance of human life should not in this class of cases outweigh the presumption in favor of the innocence of the accused. In an early Illinois case it was said: "When it is shown that a marriage has been consummated in accordance with the forms of the law, it is to be presumed that no legal impediments existed to their entering into matrimonial relations, and the fact, if shown, that either or both of the parties have been previously married, and, of course, at a former time having a husband or wife living, does not destroy the *prima facie* legality of the last marriage. The natural inference in such case is, that the former marriage has been legally dissolved, and the burden of showing that it has not been, rests upon the party seeking to impeach the last marriage. The law does not impose upon every person contracting a second marriage the necessity of preserving the evidence that the former marriage has been dissolved either by death of their former consort or by a decree of court, in order to protect themselves against a bill for a divorce or a prosecution for bigamy."²⁶ In such prosecutions there is not only the ordinary presumption of innocence but there exists also the presumption that the second marriage was legal and valid. This is the basis for rejecting proof of cohabitation as insufficient proof of marriage in prosecutions of bigamy, as the law generally supposes that the accused would abandon an illicit cohabitation rather than commit the crime of bigamy. So on this theory it has been stated that "the presumption of marriage will not arise from the co-

²⁵ *People v. Brown*, 34 Mich. 339; 81; *Teter v. Teter*, 101 Ind. 129; *People v. Mendenhall*, 119 Mich. 404, 21 N. E. 445; *Wenning v. Teeple*, 78 N. W. 325.

²⁶ *Harris v. Harris*, 8 Ill. App. 57; 144 Ind. 189, 41 N. E. 600; *Dixon v. Donahue v. Donahue*, 17 Ill. App. 578; *Johnson v. Johnson*, 114 Ill. 611, 3 N. E. 232; *Schmisseur v. Beattie*, 147 Ill. 210, 35 N. E. 525; *Potter v. Clapp*, 203 Ill. 592, 68 N. E. 12 Vt. 604.

habitation of a man with a woman, if during her life and without any proof of a divorce, he marries another woman.”²⁷

§ 2866. First husband or wife living—Proof.—The statutes on the subject of bigamy necessarily provide that the offense consists in marrying another person when the husband or wife of a prior existing marriage is still living. In order to establish the offense under such statutes it must be proved beyond a reasonable doubt that the former husband or wife is living, or was alive at the date of the alleged second marriage. Such proof is essential to a conviction; but it is not necessary that the evidence on this subject be direct and positive; the fact may be shown by circumstantial evidence. Nor is it always necessary that the proof show that the former husband or wife was alive at the precise time of the alleged second marriage, but if either is shown to be living recently prior to the time of such marriage, it is held by some courts that the law will presume the continuation of life.²⁸ The record of a decree of divorce in favor of the first wife, entered subsequent to the time of the alleged bigamous marriage was held competent and sufficient to show that the true and lawful wife was living at the time of the second marriage.²⁹ But the fact that the second wife knew that a former wife was living does not make the second marriage any less bigamous or polygamous; the effect of such knowledge is to vitiate the second marriage.³⁰

²⁷ *Jones v. Jones*, 45 Md. 144; *Breakey v. Breakey*, 2 U. C. Q. B. 349; ante, Vol. I, § 123.

²⁸ *Dotson v. State*, 62 Ala. 141; *Jones v. State*, 67 Ala. 84; *Parker v. State*, 77 Ala. 47; *Scoggins v. State*, 32 Ark. 205; *People v. Feilen*, 58 Cal. 218; *Prichard v. People*, 149 Ill. 50, 36 N. E. 103; *Hiler v. People*, 156 Ill. 511, 41 N. E. 181; *Squire v. State*, 46 Ind. 459; *State v. Hughes*, 35 Kans. 626, 12 Pac. 28; *Johnson v. Commonwealth*, 86 Ky. 122, 5 S. W. 365; *State v. Barrow*, 31 La. Ann. 691; *Barber v. State*, 50 Md. 161; *Commonwealth v. Mash*, 7 Metc. (Mass.) 472; *Commonwealth v. McGrath*, 140 Mass. 296, 6 N. E. 515; *Commonwealth v. Caponi*, 155 Mass. 534, 30 N. E. 82; *State v. Armington*, 25 Minn. 29; *State v. Plym*,

43 Minn. 385, 45 N. W. 848; *Gibson v. State*, 38 Miss. 313; *State v. Zichfield*, 23 Nev. 304, 46 Pac. 802; *State v. Norman*, 13 N. Car. 222; *State v. Burns*, 90 N. Car. 707; *Niece v. Territory*, 9 Okla. 535, 60 Pac. 300; *Glise v. Commonwealth*, 81 Pa. St. 428, 2 Wkly. No. Cas. 589; *State v. Barefoot*, 2 Rich. L. (S. Car.) 209; *Gorman v. State*, 23 Tex. 646; *May v. State*, 4 Tex. App. 424; *Hull v. State*, 7 Tex. App. 593; *State v. Goodrich*, 14 W. Va. 834; 2 *Wharton Cr. Law*, §§ 1704, 1705; *Bishop Stat. Crimes*, § 611; *Reg. v. Lumley*, L. R. 1 C. C. Res. 196, 11 Cox Cr. Cas. 274.

²⁹ *Halbrook v. State*, 34 Ark. 511; *State v. Ashley*, 37 Ark. 403.

³⁰ *United States v. Tenney*, 2 Ariz. 127, 11 Pac. 472.

§ 2867. **First husband or wife living—Presumptions.**—While it is necessary for the state to prove that the first husband or wife was living, it is not required always to prove this fact by positive or direct evidence. In some instances presumptions may supply the proof or rather aid the evidence offered. Thus it has been held that if the proof shows that recently, or at a period not too remote before the second marriage, the first husband or wife was living, the jury may presume that such first husband or wife was still living at the time of the marriage.³¹ In such cases there then arises a conflict of presumptions. The law presumes the accused to be innocent. But in this class of cases it may be presumed that the former husband or wife is living. There becomes a clear conflict of presumptions. One class of cases holds that these counter presumptions neutralize each other, and that the case must rest on the evidence and other presumptions which must be sufficient to establish the guilt beyond a reasonable doubt.³² But another class of cases, perhaps of equal weight if not on better reasoning, has held that where neither presumption is aided by proof of facts or circumstances, that the presumption of innocence supplemented by the presumption of the validity of the second marriage must prevail over the presumption that the first husband or wife is still living.³³

§ 2868. **Absence of husband or wife—Effect and burden.**—Some exceptions are made by these statutes to the effect that where a hus-

³¹ *Parker v. State*, 77 Ala. 47, 54 Am. R. 43; *Squire v. State*, 46 Ind. 459; *Gorman v. State*, 23 Tex. 646; *Williams v. Williams*, 63 Wis. 58, 23 N. W. 110; *Reg. v. Lumley*, 11 Cox Cr. Cas. 274, L. R., 1 C. C. Res. 196; *Reg. v. Willshire*, 14 Cox Cr. Cas. 541, 6 L. R. Q. B. 366; *Reg. v. Jones*, 15 Cox Cr. Cas. 284.

³² *People v. Feilen*, 58 Cal. 218; *White v. White*, 82 Cal. 427, 23 Pac. 276; *Donahue v. Donahue*, 17 Ill. App. 578; *Squire v. State*, 46 Ind. 459; *Dixon v. People*, 18 Mich. 84; *State v. Plym*, 43 Minn. 385, 45 N. W. 848; *Clayton v. Wardell*, 4 N. Y. 230; *Fenton v. Read*, 4 Johns. (N. Y.) 52; *Northfield v. Plymouth*, 20 Vt. 582; *Rex v. Harborne*, 2 Ad. &

El. 540; *Rex v. Twynning*, 2 B. & Ald. 386; *Reg. v. Willshire*, 14 Cox Cr. Cas. 541, 6 L. R. Q. B. 366; *Reg. v. Lumley*, L. R., 1 C. C. Res. 196, 11 Cox Cr. Cas. 274; 1 *Greenleaf Ev.*, §§ 34, 35; *Bishop Stat. Crimes*, § 611; 1 *Bishop Mar. Div. & Sep.*, § 949, et seq.

³³ *People v. Feilen*, 58 Cal. 218; *White v. White*, 82 Cal. 427, 23 Pac. 276; *Johnson v. Johnson*, 114 Ill. 611, 3 N. E. 232; *Jones v. Jones*, 48 Md. 391; *Senser v. Bower*, 1 P. & W. (Pa.) 450; *Chapman v. Cooper*, 5 Rich. L. (S. Car.) 452; *Montgomery v. Bevans*, 1 Sawy. (U. S.) 653, 666; *Hull v. State*, 7 Tex. App. 593; *Greensborough v. Underhill*, 12 Vt. 604.

band or wife has been absent or unheard of for a certain number of years the other may lawfully marry. But to make such absence a defense the proof must show that it was continuous for the statutory period and the husband or wife re-marrying must be ignorant of the life or death of the absent spouse; the two elements must concur. So when the state proves that the former husband or wife was living at a specified time before the second marriage the burden is then upon the defendant to show either death or a continuous absence for the statutory period.³⁴ And when the defendant has proved seven years' continuous absence as held by some cases, the burden is then on the state to prove that the accused knew that the other spouse was alive within such period.³⁵

§ 2869. First husband or wife living—Distinction in statutes. Some of these statutes provide that if any person, who has a former husband or wife living, shall marry another person, he shall be guilty of bigamy, except in certain cases. Others provide in substance that if any man or woman, being unmarried, shall knowingly marry the wife or husband of another person, such man or woman shall be deemed guilty of the crime of bigamy. Under both classes of statutes it is incumbent on the state to prove that the accused knew either that the former husband or wife was still living or that the other party to the second marriage had a husband or wife living.³⁶

§ 2870. Polygamy—Proof under Edmunds law.—The United States statute for the suppression of polygamy, commonly called the Edmunds Act was intended not only to suppress and punish polygamous marriages but also to prevent and punish persons who had theretofore contracted such marriages from thereafter cohabiting with more than one woman. It was especially provided by that act that if any male person in the exclusive jurisdiction of the United States should cohabit with more than one woman, he should on conviction be punished, etc. Under this statute it has been held that to establish the offense it is not necessary to prove that the accused

³⁴ Jones v. State, 67 Ala. 84; Parker v. State, 77 Ala. 47; 2 Wharton Cr. Law, §§ 1704, 1705. Reg. v. Heaton, 3 Fost. & F. 819; Bishop Stat. Crimes, § 607.

³⁵ People v. Meyer, 8 N. Y. St. 256; Reg. v. Curgenwen, 10 Cox Cr. Cas. 152; Reg. v. Ellis, 1 Fost. & F. 309; Arnold v. State, 53 Ga. 574; State v. Barrow, 31 La. Ann. 691; State v. Johnson, 12 Minn. 476, 93 Am. Dec. 252.

³⁶ Parker v. State, 77 Ala. 47; Ar-

and two or more women, or either of them, occupied the same bed or slept in the same room, or that he had sexual intercourse with either of them. The statute was intended to refer to the relation between man and woman, founded on the existence of actual marriage, or on the holding out of that existence. Of this the Supreme Court of the United States say: "It is the practice of unlawful cohabitation with more than one woman that is aimed at, a cohabitation classed with polygamy and having its outward semblance. It is not on the one hand meretricious unmarital intercourse with more than one woman. General legislation as to lewd practice is left to the territorial government. Nor, on the other hand, does the statute pry into the intimacies of the marriage relation. But it seeks not only to punish bigamy and polygamy, when direct proof of the existence of those relations can be made, but to prevent a man from flaunting in the face of the world the ostentation and opportunities of a bigamous household, with all the outward appearances of the continuance of the same relations which existed before the act was passed, and without reference to what may occur in the privacy of those relations."³⁷ And this rule has been carried to the point of holding a man guilty under this statute who has two wives residing within the jurisdiction of the court, both bearing his name and known as his wives, even where the evidence shows that he has deserted one and cohabits exclusively with the other.³⁸ So under a charge of living and cohabiting together it was conceded that sexual intercourse was a necessary element of the statutory offense; but it was held that the offense might be established without proof of the sexual act, even where the proof showed absolute incapacity on the part of one of the parties, as the continual sexual intercourse during entire time was not indispensable to the continuance of the bigamous cohabitation.³⁹

§ 2871. Second marriage in good faith—No defense.—The authorities are practically unanimous in holding that proof of the fact that the second marriage was entered into in good faith and under the honest belief that the first spouse was dead, constitutes no de-

³⁷ *Cannon v. United States*, 116 U. S. 55, 6 Sup. Ct. 278; *United States v. Snow*, 4 Utah 295, 9 Pac. 686; *United States v. Smith*, 5 Utah 232, 14 Pac. 291; *United States v. Peay*, 5 Utah 263, 14 Pac. 342; *United States v. Clark*, 6 Utah 120, 21 Pac. 463; *United States v. Groesbeck*, 4 Utah 487, 11 Pac. 542; *Murphy v. Ramsey*, 114 U. S. 15, 5 Sup. Ct. 747.

³⁸ *United States v. Clark*, 6 Utah 120, 21 Pac. 463.

³⁹ *Cox v. State*, 117 Ala. 103, 23 So. 806.

fense to a charge of bigamy. It will be observed, however, that these holdings are mostly under statutes where the criminal intent is not an essential of the crime; and under such statutes the second marriage is contracted at the risk of the parties.⁴⁰ On this subject the Supreme Court of Massachusetts have said: "It appears to us, that in a matter of this importance, so essential to the peace of families and the good order of society, it was not the intention of the law to make the legality of a second marriage, whilst the former husband or wife is in fact living, depend upon ignorance of such absent party's being alive, or even upon an honest belief of such person's death. Such belief might arise after a very short absence. But it appears to us, that the legislature intended to prescribe a more exact rule, and to declare, as law, that no one shall have a right upon such ignorance that the other party is alive, even upon such honest belief of death, to take the risk of marrying again, unless such belief is confirmed by an absence of seven years, with ignorance of the absent party's being alive within that time."⁴¹ But some cases hold that evidence of good faith is admissible for the purpose of mitigating the punishment.⁴²

§ 2872. Second marriage in good faith—Defense.—Under the peculiar wording of some statutes in such prosecution, a few cases hold that where the proof showed that the accused had used due care and had made due inquiry in order to ascertain the truth, and that he had reliable information and had reason to believe and did in fact believe that the other spouse had obtained a legal divorce, a conviction could not be sustained.⁴³ The same rule seems to obtain in some jurisdictions where the accused on reliable information

⁴⁰ Dotson v. State, 62 Ala. 141; 2 McClain Cr. Law, § 1076.

⁴¹ Russell v. State, 66 Ark. 185, 49 S. W. 821; State v. Hughes, 58 Iowa 165, 11 N. W. 706; Davis v. Commonwealth, 13 Bush (Ky.) 318; State v. Goodenow, 65 Me. 30; Commonwealth v. Mash, 7 Metc. (Mass.) 472; Commonwealth v. Hayden, 163 Mass. 453, 40 N. E. 846; Reynolds v. State, 58 Neb. 49, 78 N. W. 483; State v. Zichfield, 23 Nev. 304, 46

Pac. 802; People v. Weed, 29 Hun (N. Y.) 628; Medrano v. State, 32 Tex. App. 214; Reg. v. Moore, 13 Cox Cr. Cas. 544; Reg. v. Tolson, L. R., 23 Q. B. 168.

⁴² Russell v. State, 66 Ark. 185, 49 S. W. 821.

⁴³ Squire v. State, 46 Ind. 459; 1 Bishop Cr. Law, 187, note 15; Bishop Stat. Crimes, §§ 596a, 596b; 2 McClain Cr. Law, 1076.

honestly believed that the spouse of the first marriage was dead and the second marriage was contracted in good faith.⁴⁴

§ 2873. Divorce as a defense—Burden.—A legal divorce, duly granted before the second marriage constitutes a valid defense to a charge of bigamy. But where evidence of a divorce is offered as a defense in such a case, it has been held that the burden is on the defendant to prove the validity of the decree. This is on the theory that “when the defendant is, in the first instance, shown to have done an act which was unlawful unless he was distinctly authorized to do it, the proof of authority is thrown upon him.”⁴⁵ And it has been held by many cases that an invalid decree of divorce affords no defense to a charge of bigamy. This rule is applied more especially to the cases where it appeared that the accused was the person who procured such pretended divorce.⁴⁶ And the rule has been held to be the same where the accused acted under legal advice and was informed and honestly believed that he was lawfully divorced from the first wife.⁴⁷

§ 2874. First and second wives as witnesses.—The statutes very generally provide that in criminal cases the husband and wife shall not be witnesses for or against each other. The cases are not harmonious on the question of the competency of the first and lawful wife as a witness in prosecution for bigamy. The general rule, supported by the weight of the authorities, is that in such a prosecution

⁴⁴ *Dixon v. People*, 18 Mich. 84; *People v. Meyer*, 8 N. Y. St. 256; *Reynolds v. State*, 58 Neb. 49, 78 N. W. 483; *State v. Stank*, 9 Ohio Dec. 8, 10 Cln. Wk. Law Bul. 16; *Reg. v. Turner*, 9 Cox Cr. Cas. 145; *Reg. v. Jones*, 11 Cox Cr. Cas. 358; *Reg. v. Horton*, 11 Cox Cr. Cas. 670; *g. v. Moore*, 13 Cox Cr. Cas. 544; *Reg. v. Tolson*, L. R. 23 Q. B. 168, 16 Cox Cr. Cas. 629.

⁴⁵ *Comonwealth v. Boyer*, 7 Allen (Mass.) 306; *State v. Barrow*, 31 La. Ann. 691; *Reynolds v. State*, 58 Neb. 49, 78 N. W. 483; *Tice v. Reeves*, 30 N. J. L. 314; 1 Jones Ev., § 199.

⁴⁶ *Thompson v. State*, 28 Ala. 12; *Tucker v. People*, 122 Ill. 583, 13 N. E. 809; *Hood v. State*, 56 Ind. 263; *Commonwealth v. Lane*, 113 Mass. 458; *People v. Dawell*, 25 Mich. 247; *Crawford v. State*, 73 Miss. 172, 18 So. 848; *State v. Gonce*, 79 Mo. 600; *People v. Baker*, 76 N. Y. 78; *People v. Faber*, 92 N. Y. 146; *People v. Chase*, 28 Hun (N. Y.) 310; *People v. Weed*, 29 Hun (N. Y.) 628; *Van Fossen v. State*, 37 Ohio St. 317; 2 McClain Cr. Law, § 1075.

⁴⁷ *Russell v. State*, 66 Ark. 185, 49 S. W. 821; *State v. Armington*, 25 Minn. 29; *Davis v. Commonwealth*, 13 Bush (Ky.) 318.

the first and true wife is not competent as a witness against her husband.⁴⁸ But some courts hold that the lawful wife is a competent witness against the accused to prove the marriage between them.⁴⁹ Where the first marriage is clearly proved, or in case it is not controverted, it has been held that the second wife is a competent witness to prove the second marriage, and that she is competent as to all other questions which do not tend to defeat the first marriage or legalize the second.⁵⁰

⁴⁸ Williams v. State, 44 Ala. 24; State v. Ryan, 1 Pen. (Del.) 81, 39 Atl. 777; Williams v. State, 67 Ga. 260; Miner v. People, 58 Ill. 59; Hiller v. People, 156 Ill. 511, 41 N. E. 181; Barber v. People, 203 Ill. 543, 68 N. E. 93; People v. Quanstrom, 93 Mich. 254, 53 N. W. 165; People v. Westbrook, 94 Mich. 629, 54 N. W. 486; People v. Turner, 116 Mich. 390, 74 N. W. 519; State v. Armstrong, 4 Minn. 335; Overton v. State, 43 Tex. 616; Compton v. State, 13 Tex. App. 271; Bassett v. United States, 137 U. S. 496, 11 Sup. Ct. 165; State v. McDavid, 15 La. Ann. 403; State v. Ulrich, 110 Mo. 350, 19 S. W. 656; Bishop Stat.

Crimes, § 613; 1 Russell Crimes, § 715.

⁴⁹ State v. Sloan, 55 Iowa 217, 219, 7 N. W. 516; State v. Hughes, 58 Iowa 165, 11 N. W. 706; State v. Armstrong, 4 Minn. 335; Lord v. State, 17 Neb. 526, 23 N. W. 507; Owens v. State, 32 Neb. 167, 174, 49 N. W. 226; State v. McDavid, 15 La. Ann. 403; State v. Patterson, 2 Ired. L. (N. Car.) 346; Johnson v. State, 61 Ga. 305; Finney v. State, 3 Head (Tenn.) 544.

⁵⁰ Lowery v. People, 172 Ill. 466, 50 N. E. 165; Barber v. People, 203 Ill. 543, 68 N. E. 93; Miles v. United States, 103 U. S. 304; State v. Patterson, 2 Ired. L. (N. Car.) 346.

CHAPTER CXXXV.

BLACKMAIL.

Sec.	Sec.
2875. Nature and extent.	2884. Instituting criminal proceedings—Intent.
2876. Definition.	2885. Proof of intent to extort.
2877. Statutory definition.	2886. Threats to collect bona fide indebtedness.
2878. Extortion.	2887. Truth or falsity of charge immaterial.
2879. Extortion and bribery.	2888. Knowledge that crime was committed—No defense.
2880. Proof of threat.	
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2882. Threat of prosecution.	
2883. Threat—Prosecution by third person.	

§ 2875. **Nature and extent.**—The term “blackmail” originated in the nature and character of certain rents. Originally the idea of crime was not associated with the term. In later English history the term was used to denote a tribute enforced by Scottish Highland chieftains on the inhabitants of the Lowlands, or on English dwellers along the Scottish border on condition that they should be free from the raids of the border thieves. In the progress and history of the development of crime the term has come to be applied to threats or threatening letters accusing and threatening prosecution and exposure unless a sum of money is paid or valuable articles or property delivered. It now also generally includes the idea of extortion by an officer who, under threats or menace of arrest and imprisonment compels the payment of illegal or unwarranted fees.¹

§ 2876. **Definitions.**—The general definitions of the term blackmail include the idea of compelling a person to pay a sum of money in consideration that the person demanding the money will not prosecute him for an alleged crime or expose him on account of some alleged infamous conduct. A more practical definition is given as

¹1 Hume Hist. of Eng. 473; Life Asso. &c. v. Boogher, 8 Mo. App. 173.

follows: "the extortion of money by threats or overtures towards criminal prosecution, or the destruction of a man's reputation or social standing."² One of the New York inferior courts said of the term: "In common parlance, and in general acceptation, it is equivalent to, and synonymous with, extortion—the exaction of money, either for the performance of a duty, the prevention of an injury or the exercise of an influence. It supposes the service to be unlawful, and the payment involuntary. Not unfrequently it is extorted by threats, or by operating upon the fears or the credulity, or by promises to conceal, or offers to expose, the weaknesses, the follies, or the crimes of the victim. There is moral compulsion, which neither necessity, nor fear, nor credulity can resist."³

§ 2877. Statutory definition.—The statutes which define the offense and prescribe the penalty do not always use the term blackmail; but it comes clearly within the meaning and terms of these statutory definitions. The statutes upon the subject are substantially as follows: "That if any person shall either verbally, or by any letter or writing, or any written or printed communication demand of any person with menaces, any chattel, money, or other valuable security; or if any person shall accuse or threaten to accuse, or shall knowingly send or deliver any letter or writing or any written or printed communication, with or without a name subscribed thereto, or signed with a fictitious name, or with any letter, mark or designation, accusing or threatening to accuse, any person of any crime, punishable by law, or of any immoral conduct, which, if true, would tend to degrade, and disgrace such person, or to do any injury to the person or property of any one, with intent to extort or gain from such person, any chattel, money or valuable security, or any pecuniary advantage whatsoever, or with an intent to compel the person threatened to do any act against his will, with the intent aforesaid; every such offender shall be deemed guilty of a felony."⁴

² Black Law Dict.—"Blackmail;"
1 Bouvier L. Dict.—"Blackmail;"
1 Rap. & Lawr. L. Dict.—"Blackmail."

³ Edsall v. Brooks, 17 Abb. Pr. (N. Y.) 221, 26 How. Pr. (N. Y.) 426, 2 Rob. (N. Y.) 29; Edsall v. Brooks, 3 Rob. (N. Y.) 284; Hess v.

Sparks, 44 Kans. 465, 24 Pac. 979;
2 Wharton Cr. Law, § 1664.

⁴ McMillen v. State, 60 Ind. 216; Kistler v. State, 54 Ind. 400; State v. Hammond, 80 Ind. 80; State v. Pierce, 76 Iowa 189, 40 N. W. 715; People v. Griffin, 2 Barb. (N. Y.) 427; Brabham v. State, 18 Ohio St. 485.

§ 2878. Extortion.—What is now called extortion and generally made criminal comes clearly within the definition and meaning of blackmail. But it is more limited in its application as a criminal offense. As a crime it is applied, perhaps exclusively, to officers who by reason of their official position and by threats and menaces extort money unlawfully or without authority of law. Blackstone defines it to be “an abuse of public justice which consists in any officer’s unlawful taking, by color of his office, any money that is not due to him.”⁵ The statutory offense, usually consists in taking or exacting compensation or reward for services in addition to such as are allowed by law and is generally made a misdemeanor only.⁶ As defined by one law writer: “It is the corrupt demanding or receiving by a person in office, of a fee for services which should be rendered gratuitously; or where compensation is permissible, of a larger fee than the law justified, or a fee not yet due.”⁷

§ 2879. Extortion and bribery.—A clear distinction exists between the statutory offense of extortion and bribery. Proof of the one will not support the other, and the soliciting and accepting of a bribe by an officer cannot be shown to be extortion. Thus proof that an officer holding a search warrant indicated that for a sum of money paid him he would not serve the warrant, and that he did receive and accept a sum of money, was held insufficient to sustain a charge of blackmail or extortion.⁸

§ 2880. Proof of threat.—The proof must show that a threat was used for the purpose or with the intention of extorting the money. But it is not necessary that either the oral language or the writing should expressly state a threat; it is not even necessary that the threat should be apparent from the face of the letter. It is sufficient under some statutes, if the language used is adapted to imply a threat; it is then held to come within the statute. It has been held that if the writing is adapted to imply one or more of the threats mentioned in the statute the offense is committed. On this subject the California court say: “Parties guilty of the offense here alleged seldom possess the hardihood to speak out boldly and plainly, but deal in mysteries and

⁵ 2 Blackstone Comm. 141.

⁷ 2 Bishop Cr. Law (New), § 390;

⁶ Edsall v. Brooks, 3 Rob. (N. Y.) 284. ² Wharton Cr. Law, § 1574.

⁸ State v. Pierce, 76 Iowa 189, 40 N. W. 715.

ambiguous phrases, mysterious and ambiguous to the world at large, but read in the light of surrounding circumstances by the party for whom intended they have no uncertain meaning.”⁹ The New York court has emphasized the fact that no precise words are necessary to convey the threat. The court said: “To ascertain whether a letter conveys a threat, all its language, together with the circumstances under which it was written, and the relations between the parties may be considered, and if it can be found that the purport and natural effect of the letter is to convey a threat, then the mere form of words is unimportant.”¹⁰ It is not necessary to prove the effect which the threats may have had on the person threatened; nor is it necessary to prove that any money or property was thereby obtained. The offense under the statutes generally consists in the malicious threat to accuse another of an offense with intent to extort money.¹¹

§ 2881. Parol proof to aid or explain writing.—The proof must show to the satisfaction of the jury that the threat was made in the letter, where it is so charged. But if the threat does not clearly appear parol proof is admissible and competent to show that by the use of the language, figures or phrases employed by the writer, the threat was in fact made. “A person, by the use of a phrase or word, or by referring to some prior circumstances, well known to both parties, might convey to the mind of the persons addressed, the understanding that, if the thing requested or demanded was not done, that the writer would accuse him of some criminal offense or violation of the moral laws of the community where he resided, which would bring him into contempt and disgrace.”¹² If the letter containing the threat is ambiguous it may be explained by parol proof of extraneous facts, and the intention of the writer may be obtained by proof of his declarations. And it has been held that the prosecuting witness may be asked as to what appeared to him to be the meaning of the letter.¹³

⁹ *People v. Choynski*, 95 Cal. 640, 30 Pac. 791; *People v. Thompson*, 97 N. Y. 313. *Eichler*, 75 Hun (N. Y.) 26, 26 N. Y. S. 998; *People v. Thompson*, 97 N. Y. 313.

¹⁰ *People v. Thompson*, 97 N. Y. 313.

¹¹ *State v. Bruce*, 24 Me. 71.

¹² *People v. Gillian*, 50 Hun (N. Y.) 35, 2 N. Y. S. 476; *People v.*

¹³ *Motsinger v. State*, 123 Ind. 498, 24 N. E. 342; *State v. Linthicum*, 68 Mo. 66; 2 Wharton Cr. Law, § 1665.

§ 2882. **Threat of prosecution.**—It is not required that the proof show an actual threat to institute criminal proceedings. The threats need not refer in terms to the criminal courts. It is sufficient if they reasonably be understood to embrace a criminal prosecution. Thus where the threats were “give me five hundred dollars, or I’ll put this thing in court,” and “if you don’t see my lawyer before five o’clock you will be arrested,” these were held sufficiently broad to embrace threats of a criminal prosecution.¹⁴ So it has been held that proof of a threat “to proceed against you criminally,” is equivalent to proof of a threat to accuse the person of a crime.¹⁵

§ 2883. **Threat—Prosecution by third person.**—Nor is it necessary to the commission of the offense that the person making the threat should himself make the accusation or institute the criminal proceedings. It may be done by a third person. Thus where the letter containing the alleged threat showed that the prosecution would be instituted by another person, but where it further appeared that the writer of the letter would be the principal witness on the part of the state in the criminal prosecution, it was held sufficient as a threat that a formal accusation of crime would be made.¹⁶

§ 2884. **Instituting criminal proceedings—Intent.**—The offense may be complete without sending any communication whatever to the person threatened. It may be committed by instituting criminal proceedings; or by entering into a conspiracy and instituting such proceedings for the purpose and with the intent to extort money or other thing of value by inducing or compelling the defendant in such proceedings to pay money for the purpose of ending the prosecution. Thus under an indictment which charged the defendants with a conspiracy for the purpose of extorting money by filing or causing to be filed with an officer having jurisdiction an affidavit charging an alleged criminal assault, it was held sufficient to prove that the affidavit was filed with the intent of extorting money from the person therein accused and that the criminal charge was a sufficient accusation within the meaning of the statute.¹⁷

¹⁴ Commonwealth v. Bacon, 135 Mass. 521; People v. Tonielli, 81 Cal. 275, 22 Pac. 678.

¹⁵ People v. Eichler, 75 Hun (N. Y.) 26, 26 N. Y. S. 998.

¹⁶ Commonwealth v. Dorus, 108 Mass. 488; People v. Braman, 30 Mich. 460.

¹⁷ Utterback v. State, 153 Ind. 545, 55 N. E. 420.

§ 2885. **Proof of intent to extort.**—The mere proof of the words used in the way of a threat is not sufficient to establish the crime. The proof must show the existence of an intent to extort. The Supreme Court of Massachusetts said: “The gist of the offense is the intent to extort money by a malicious threat to accuse of some crime. The words used do not constitute the offense, without the accompanying intent to extort.”¹⁸ On this question of the proof of intent the same court said: “The act itself implies criminal intent, and there is no occasion in construing the statute to hold that, to create the offense, anything more is required than is implied in the usual definition of malice.”¹⁹ And it has been held that the intent may appear on the face of the writing itself.²⁰

§ 2886. **Threats to collect bona fide indebtedness.**—The question has been raised as to whether or not the making of threats to prosecute for a supposed or alleged crime for the purpose of compelling the payment of a bona fide indebtedness is an offense under the various statutes on the subject of blackmail. It must be borne in mind that the statutory offense consists in making the threat with the intent to extort or for gain. The solution of the problem then turns upon the point whether a threat to compel the payment of a bona fide indebtedness is or is not an intention to extort or to gain. The few cases on the subject have held that such threats are not within the statute. Of this the Supreme Court of Indiana said: “We are of opinion that a threat to prosecute for an alleged or supposed offense connected with the creation of a debt, where the object of the threat is merely to secure the payment of the debt due from the person threatened to the person making the threat, does not come within the spirit or purpose of the statute.”²¹ So where threats were used for the purpose of securing payment for property destroyed, and where the act on which the threatening accusation was based was not punishable by law, it was held that the offense was not established.²²

¹⁸ Commonwealth v. Moulton, 108 Mass. 307; Commonwealth v. Goodwin, 122 Mass. 19; People v. Gardner, 144 N. Y. 119, 38 N. E. 1003; State v. Bruce, 24 Me. 71.

¹⁹ Commonwealth v. Goodwin, 122 Mass. 19; Commonwealth v. Buckley, 147 Mass. 581, 18 N. E. 571.

²⁰ People v. Braman, 30 Mich. 460.

²¹ State v. Hammond, 80 Ind. 80; People v. Griffin, 2 Barb. (N. Y.) 427; Mann v. State, 47 Ohio St. 556, 26 N. E. 226; see, Brabham v. State, 18 Ohio St. 485.

²² Mann v. State, 47 Ohio St. 556, 26 N. E. 226.

§ 2887. **Truth or falsity of charge immaterial.**—The prosecution is only required to make out or prove the threat with the intention of unlawfully extorting either money or something of value from the person threatened. The state is not required to offer any proof on the subject of the offense or conduct alleged in connection with the threat. The truth or falsity of the charge made on which the threat or the effort to extort is based, is wholly immaterial.²³ On this theory it was held error for a court to instruct a jury that if they found the defendant guilty of blackmail they might consider the facts in relation to the charge made as bearing on the question of his punishment.²⁴ But in some cases it has been held that the truth of the accusation may become material for the purpose of determining the intent with which the defendant made the accusation.²⁵

§ 2888. **Knowledge that crime was committed—No defense.**—The accused will not be permitted to prove as a matter of defense that he either believed or knew that the person threatened was in fact guilty of the crime charged. On this subject it was said by a New York court: "The fact that the person who, in writing or orally, makes such a threat for such a purpose believes or even knows that the person threatened has committed the crime of which he is threatened to be accused, does not make the act less criminal. The moral turpitude of threatening for the purpose of obtaining money, to accuse a guilty person of the crime which he has committed is as great as it is to threaten, for a like purpose, an innocent person of having committed a crime. The intent is the same in both cases to acquire money without legal right by threatening a criminal prosecution. But threatening a guilty person for such a purpose is a greater injury to the public than to threaten an innocent one, for the reason that the object is likely to be obtained, and the result is the concealment and compounding of felonies to the injury of the state. The fact that the defendant believed in the complainant's guilt is no defense and is not even a mitigating fact."²⁶

²³ *People v. Choynski*, 95 Cal. 640, 30 Pac. 791; *Motsinger v. State*, 123 Ind. 498, 24 N. E. 342; *Elliott v. State*, 36 Ohio St. 318; *Commonwealth v. Buckley*, 147 Mass. 581, 18 N. E. 571; *People v. Whittemore*, 102 Mich. 519, 61 N. W. 13.

²⁴ *Kistler v. State*, 64 Ind. 371.

²⁵ *Mann v. State*, 47 Ohio St. 556, 26 N. E. 226; *Reg. v. Richards*, 11 Cox Cr. Cas. 43.

²⁶ *People v. Eichler*, 75 Hun (N. Y.) 26, 26 N. Y. S. 998.

CHAPTER CXXXVI.

BLASPHEMY.

Sec.	Sec.
2889. Generally.	2894. Words used in hearing of others—Proof.
2890. Common law definitions.	2895. Profanity—Nuisance.
2891. Punishable at common law.	2896. Words used—Illustration.
2892. Statutory definition.	
2893. Character of language used.	

§ 2889. Generally.—The statutes of almost every civilized country make blasphemy or profanity a crime. But there is some diversity among these statutes as to what constitutes the offense. However, there are some general definitions that are practically common to all the statutes; or rather there are certain terms and principles which form the underlying bases of all the statutory offenses. The punishment for blasphemy is not intended to cause or compel a belief in or recognition of God or of a Supreme Being; but the object and purpose of the punishment is to secure order and maintain decency, and to prevent that which is offensive to the general community and to a large portion of the citizens of every country. The common law has been held to be the guardian, to a certain extent, of the morals of the people, and its object is to protect against offenses which are openly and notoriously against public decency and good morals.¹ Legislatures do not prescribe penalties and courts do not inflict punishment for blasphemy on the theory that it is a crime against God, but for the reason that the offense is considered as committed against man, or against society, and that it tends to disturb the public peace.² Courts now very generally recognize Christianity, as revealed and taught by the Bible, as a part of the law of the land, and therefore respect and protect its institutions as well as to regulate the public morals.³ "The laws and institutions of this state

¹ Grisham v. State, 2 Yerg. (Tenn.) 589; Bell's Case, 6 City Hall Rec. (N. Y.) 38.

² State v. Chandler, 2 Har. (Del.) 553.

³ People v. Ruggles, 8 Johns. (N.

Y.) 290; Bell v. State, 1 Swan (Tenn.) 42; Updegraph v. Commonwealth, 11 S. & R. (Pa.) 394; Sparhawk v. Union &c. R. Co., 54 Pa. St. 401.

are built on the foundation of reverence for Christianity. To this extent, at least, it must certainly be considered as well settled that the religion revealed in the Bible is not to be openly reviled, ridiculed or blasphemed, to the annoyance of sincere believers who compose the great mass of the good people of the commonwealth.”⁴

§ 2890. Common law definitions.—In order to get the definition of blasphemy, as in treason, murder, perjury and many other crimes, resort must be had to the common law for the legal definition. According to some definitions blasphemy “consists in maliciously reviling God, or religion.”⁵ An English court said: “They would not suffer it to be debated whether defaming Christianity in general was not an offense at common law; for that whatever strikes at the root of Christianity tends manifestly to a dissolution of the Civil Government.”⁶ Some writers say: “Blasphemy is any oral or written reproach maliciously cast upon God, His name, attributes or religion.”⁷ “In English law, blasphemy is the offense of speaking matter relating to God, Jesus Christ, the Bible or the Book of Common Prayer, intended to wound the feelings of mankind or to excite contempt and hatred against the Church by law established, or to promote immorality. According to some opinions it is also blasphemy to speak words denying the truth of Christianity in general, or the existence of God, even if spoken decently and in good faith.”⁸ “In criminal law, to attribute to God that which is contrary to his nature, and does not belong to him, and to deny what does; a false reflection uttered with a malicious design of reviling God.”⁹

§ 2891. Punishable at common law.—Blackstone says: “The fourth species of offenses, therefore, more immediately against God and religion, is that of blasphemy against the Almighty, by denying his being or providence; or by contumelious reproaches of our Savior Christ. Whither also may be referred all profane scoffing at the holy scripture, or exposing to contempt and ridicule. These are offenses

⁴ *Zelsweiss v. James*, 63 Pa. St. 465; *Goree v. State*, 71 Ala. 7; *Andrew v. New York Bible &c. Soc.*, 4 Sandf. (N. Y.) 156.

⁵ *People v. Ruggles*, 8 Johns. (N. Y.) 290.

⁶ *Rex v. Woolston*, 2 Str. 834, Fitzg. 64; *Taylor's Case*, Vent. 293.

⁷ 2 Bishop Cr. Law, §§ 76, 88; *De laney, Ex parte*, 43 Cal. 478.

⁸ *Rap. & Lawr. L. Dict.*—“Blasphemy;” *Black L. Dict.*—“Blasphemy.”

⁹ *Bouvier L. Dict.*—“Blasphemy.”

punishable at common law by fine and imprisonment, or other infamous corporal punishment; for Christianity is part of the laws of England.”¹⁰ The publication of a blasphemous libel on the Old Testament has been held to be indictable offense at common law.¹¹ Some cases admit that Christianity is so far a part of the common law, or the law of the land, that the law will not permit the essential truths of religion to be ridiculed and reviled, and that blasphemy was an indictable offense at common law.¹²

§ 2892. Statutory definition.—An early Massachusetts statute provided “that if any person shall wilfully blaspheme the holy name of God, by denying, cursing or contumeliously reproaching God, his creation, government or final judging of the world, etc.” In commenting on this subject the Supreme Court of Massachusetts said: “In general, blasphemy may be described as consisting in speaking evil of the Deity with an impious purpose to derogate from the divine majesty, and to alienate the minds of others from the love and reverence of God. It is purposely using words concerning God, calculated and designed to impair and destroy the reverence, respect and confidence due to him, as the intelligent creator, governor and judge of the world. It embraces the idea of detraction when used toward the Supreme Being; as ‘calumny’ usually carries the same idea, when applied to an individual. It is a wilful and malicious attempt to lessen men’s reverence of God, by denying his existence, or his attributes as an intelligent creator, governor and judge of men, and to prevent their having confidence in him as such.”¹³ The Pennsylvania statute provided “that whosoever shall wilfully, premeditatedly, and despitefully blaspheme, and speak loosely and profanely of Almighty God, Christ Jesus, the Holy Spirit,

¹⁰ 4 Blackstone Comm. 59; Updegraph v. Commonwealth, 11 S. & R. (Pa.) 394; State v. Chandler, 2 Har. (Del.) 553; Alkenhead’s Case, 13 State Tr. 918; Williams’ Case, 26 State Tr. 654; Eaton’s Case, 31 State Tr. 927; Taylor’s Case, Vent. 293; Rex v. Woolston, 2 Str. 834, Fitzg. 64; Rex v. Waddington, 1 B. & C. 26, 8 E. C. L. 12; Cowan v. Milbourn, L. R., 2 Exch. 230; Nayler’s Case, 5 State Tr. 802; Reg. v. Justice of Lancashire, 7 Cox Cr. Cas.

76; Reg. v. Bradlaugh, 15 Cox Cr. Cas. 217.

¹¹ Reg. v. Hetherington, 5 Jur. 529; Reg. v. Bradlaugh, 15 Cox Cr. Cas. 217; Williams’ Case, 26 State Tr. 654.

¹² Andrew v. New York Bible &c. Soc., 4 Sandf. (N. Y.) 156; Updegraph v. Commonwealth, 11 S. & R. (Pa.) 394; Vidal v. Girard, 2 How. (U. S.) 126, 198.

¹³ Commonwealth v. Kneeland, 20 Pick. (Mass.) 206; People v. Ruggles, 8 Johns. (N. Y.) 290.

or the Scriptures of Truth, and is legally convicted thereof, shall forfeit, etc."¹⁴

§ 2893. Character of language used.—However explicit and definite the statutes may be it is not always necessary, in order to establish the offense, to prove that the name of the Deity or any appellation thereof was used. It has been held that where "any words importing an imprecation of divine vengeance or implying divine condemnation so used as to constitute a public nuisance would suffice."¹⁵ And the Supreme Court of Tennessee said: "A single act of profanity would not ordinarily be sufficient to convict a defendant. But, as we have said, even a single oath, either by its terms, its tone or manner, or the circumstances under which it was uttered, might be a nuisance."¹⁶ In an indictment for blasphemy, it must be charged, and the proof must show that the words were spoken profanely. This was held to be the gist of the offense.¹⁷

§ 2894. Words used in hearing of others—Proof.—It is not sufficient to establish the offense of blasphemy to prove the speaking of the words only. And it has been held that a person could not be convicted on such an indictment on proof of his confession that he had made use of the words charged in the indictment. In order to establish the offense the state must prove that the defendant used the language alleged to be blasphemous and that it was so used in the presence and hearing of other persons.¹⁸ The rule adopted by a recent case is "that profane swearing and cursing in a loud and boisterous tone of voice, in the presence and hearing of citizens of the commonwealth passing and repassing on the public streets and highways of

¹⁴ *Updegraph v. Commonwealth*, 11 S. & R. (Pa.) 394; a very complete collection of the statutes of the various states on the subject of blasphemy, together with cases on the sufficiency of the indictment and the constitutionality of such statutes is found in the notes in, 22 L. R. A. 353.

¹⁵ *Gainnes v. State*, 75 Tenn. 410; *Isom v. State* (Tenn.) Sept. Term 1880; *Holcomb v. Cornish*, 8 Conn. 375.

¹⁶ *Young v. State*, 78 Tenn. 165.

¹⁷ *Commonwealth v. Spratt*, 14 Phila. (Pa.) 365; *Updegraph v. Commonwealth*, 11 S. & R. (Pa.) 394.

¹⁸ *People v. Porter*, 2 Park. Cr. Cas. (N. Y.) 14; *State v. Chandler*, 2 Har. (Del.) 553; *Goree v. State*, 71 Ala. 7; *State v. Pepper*, 68 N. Car. 259; *State v. Barham*, 79 N. Car. 646; *Commonwealth v. Linn*, 158 Pa. St. 22, 27 Atl. 843, 22 L. R. A. 353; *Bell v. State*, 1 Swan (Tenn.) 42; *Young v. State*, 78 Tenn. 165.

the commonwealth to such an extent as to be a common nuisance to all citizens being present and hearing the same, is an indictable offense at common law."¹⁹ But under some statutes in prosecutions for blasphemy or profanity it is not necessary to prove that the profane language was used publicly.²⁰ Under a statute which makes it a crime to "profanely swear and curse in a public place," it has been correctly held that "the indictment should set out and the proof should show the words spoken."²¹ And according to the rule in some states a single act of profanity, or profane swearing, is punishable as against good morals.²²

§ 2895. Profanity—Nuisance.—According to the statutes and decisions in some states it must be stated in the indictment and proved on the trial that the profanity charged was uttered in the hearing of divers persons, and the proof must be sufficient to show that the act constituted a nuisance. As said in one case: "To render the crime indictable, the acts must be so repeated and public as to become a nuisance and inconvenience to the public, for they then constitute a public nuisance. . . . It has been repeatedly decided by this court that profane swearing is not punishable by indictment in this state when committed in single acts; but to make it so, as has been intimated by several judges, it must be perpetrated so publicly and repeatedly as to become an annoyance and inconvenience to the citizens at large."²³ The Supreme Court of Tennessee adopted the same rule and held that whenever, upon a trial under a sufficient indictment, there is evidence that the swearing, or profane language was a nuisance to the public, the offense is made out.²⁴ From these holdings it must not

¹⁹ *Commonwealth v. Linn*, 158 Pa. St. 22, 27 Atl. 843, 22 L. R. A. 353.

²⁰ *Bodenhamer v. State*, 60 Ark. 10, 28 S. W. 507; *Taney v. State*, 9 Ind. App. 46, 36 N. E. 295.

²¹ *Walton v. State*, 64 Miss. 207, 8 So. 171; *State v. Freeman*, 63 Vt. 496, 22 Atl. 621; *State v. Ratliff*, 10 Ark. 530; *Updegraph v. Commonwealth*, 11 S. & R. (Pa.) 394; *Rex v. Sparling*, 1 Str. 497; *Rex v. Poplewell*, 1 Str. 686; 2 Bishop Cr. Proc., § 123.

²² *Delaney, Ex parte*, 43 Cal. 478.

²³ *State v. Jones*, 9 Ired. L. (N. Car.) 38; *State v. Deberry*, 5 Ired. L. (N. Car.) 371; *State v. Brown*, 3 Mur. (N. Car.) 224; *State v. Waler*, 3 Mur. (N. Car.) 229; *State v. Baldwin*, 1 Dev. & B. (N. Car.) 195; *State v. Ellar*, 1 Dev. (N. Car.) 267; *State v. Pepper*, 68 N. Car. 259; *State v. Powell*, 70 N. Car. 67; *Delaney, Ex parte*, 43 Cal. 478.

²⁴ *State v. Graham*, 3 Sneed (Tenn.) 134; *State v. Steele*, 3 Helsk. (Tenn.) 135; *Gaines v. State*, 75 Tenn. 410; *Young v. State*, 78 Tenn. 165.

be understood that it would be required to prove a succession of separate and distinct acts or occasions of profanity. Such a rule would defeat the purpose of all such statutes. But consistently with these cases, where the proof shows that on a single occasion, the continued and public use of profane oaths frequently and boisterously repeated for the space of five minutes, was held sufficient under an indictment charging a public nuisance.²⁵ Under the common law, as held and administered in some of the states, in order to establish a case of profanity the proof must show that it was so public as to be a nuisance.²⁶

§ 2896. Words used—Illustrations.—The general definitions of blasphemy must be relied on principally as precedents. Of the many cases sustaining indictments for such offense, very few of them profess to give the language used. Some, however, have stated the substance of the charge. Thus in one case, it was held a sufficient charge of blasphemy where the accused, among other things, used in substance, the following: "That the holy scriptures were a mere fable, that they were contradictions, and that although they contained a number of good things, yet they contained a great many lies."²⁷ In another case it was held sufficient where the accused used the wicked and blasphemous words, to wit, "Jesus Christ was a bastard, and his mother must be a whore."²⁸ Another expression held sufficient was as follows: "That the virgin Mary was a whore and Jesus Christ was a bastard."²⁹ Another charge was held sufficient where it stated that the accused did "unlawfully and profanely curse, swear, aver and imprecate by and in the name of God, Jesus Christ and the Holy Ghost, by then and there unlawfully saying 'God damned.'"³⁰

²⁵ *State v. Chrisp*, 85 N. Car. 528; *State v. Jones*, 9 Ired. L. (N. Car.) 38; *State v. Brewington*, 84 N. Car. 783.

²⁶ 1 Archibald Pl. & Pr. 607; Clark Cr. Law 303; 2 Wharton Cr. Law, § 1431; *State v. Jones*, 9 Ired. L. (N. C.) 38; *State v. Powell*, 70 N. Car. 67; *Gaines v. State*, 75 Tenn.

²⁷ *Updegraph v. Commonwealth*, 11 S. & R. (Pa.) 394.

²⁸ *People v. Ruggles*, 8 Johns. (N. Y.) 290.

²⁹ *State v. Chandler*, 2 Har. (Del.) 553.

³⁰ *Taney v. State*, 9 Ind. App. 46, 36 N. E. 295.

CHAPTER CXXXVII.

BRIBERY.

<p>Sec. 2897. Generally. 2898. Burden of proof. 2899. Questions of law or fact. 2900. Identity. 2901. Intent. 2902. Evidence for prosecution— Other acts of accused. 2903. Documentary evidence.</p>	<p>Sec. 2904. Financial dealings of parties. 2905. What need not be proved— Variance. 2906. Accomplices — Decoy — Con- spirators. 2907. Confessions and admissions. 2908. Defenses.</p>
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§ 2897. Generally.—Bribery has been defined as the voluntary giving or receiving of anything of value in corrupt payment for an official act done or to be done.¹ Another definition that has frequently been approved is that bribery is the receiving or offering any undue reward by or to any person whatsoever, whose ordinary profession or business relates to the administration of public justice, in order to influence his behavior in office, and incline him to act contrary to the known rules of honesty and integrity.² But even at common law a similar giving, offering or receiving of money or any undue reward to an election officer or even to a voter to corruptly influence him might constitute bribery;³ and, under some of the modern statutes, the term has a still broader meaning.⁴

¹ 2 Bishop Cr. Law, § 85; *State v. Pritchard*, 107 N. Car. 921, 12 S. E. 50; *Honaker v. Board of Education*, 42 W. Va. 170, 175, 24 S. E. 544, 57 Am. St. 847, 32 L. R. A. 413; as to instigating and soliciting bribe, see Note III, 25 L. R. A. 434.

² 1 Russell Crimes, 154; *Watson v. State*, 29 Ark. 299, 302; *State v. Davis*, 2 Pen. (Del.) 139, 141, 45 Atl. 394; *Walsh v. People*, 65 Ill. 58, 65, 16 Am. R. 569; see also, *State v. Miles*, 89 Me. 142, 36 Atl. 70; as to embracery, see, 1 Russell

Crimes 264; 1 Hawkins P. C., Chap. 85, § 7; 4 Blackstone Comm. 140.

³ *Rex v. Plympton*, 2 Ld. Raym. 1377; *Russell Crimes* 154; *Simpson v. Yeend*, L. R. 4 Q. B. 626; *Bayntun v. Cattle*, 1 Mood. & R. 265; see also note in, 5 L. R. A. 217.

⁴ See, *United States v. McBosley*, 29 Fed. 897; *Thompson v. State*, 16 Ind. App. 84, 44 N. E. 763; *State v. Williams*, 136 Mo. 293, 38 S. W. 75 (bribery of witness); *Berry v. Hull*, 6 N. Mex. 643, 30 Pac. 936.

§ 2898. **Burden of proof.**—In prosecutions for bribery as in other criminal cases, the accused is presumed to be innocent, and the burden of establishing his guilt by proving all the necessary elements of the offense is upon the state.⁵ Thus, the state must generally prove that a corrupt offer or solicitation to bribe was made, or an agreement to give, receive and accept a bribe, and that such a proposal or agreement was made to, by or with an officer or a person at the time acting in an official capacity.⁶ And, as in other prosecutions for crime, the defendant's guilt must be proved beyond a reasonable doubt.

§ 2899. **Questions of law or fact.**—What is necessary in law to constitute bribery is a question of law for the court. But whether, under the circumstances, bribery has been committed by the accused is a question of fact for the jury.⁷ So, the question as to whether the promise or payment was made in good faith for a lawful purpose is a question of fact for the jury.⁸ As elsewhere shown, however, there are a few jurisdictions in which the jurors are made judges of the law as well as the facts. Yet, even in such jurisdictions, the court instructs as to the law. And it has been held that whether an officer is one who comes within the statute is a question of law for the court.⁹

§ 2900. **Identity.**—The identity of the accused as a guilty party must, of course, be shown either by direct or circumstantial evidence, but if he is charged with accepting a bribe, it seems that the identity of the person offering the bribe need not be proved. It has been held

⁵ Yee Gee, In re, 83 Fed. 145; White v. State, 103 Ala. 72, 16 So. 63; Commonwealth v. Murray, 135 Mass. 530; State v. Graham, 96 Mo. 120, 8 S. W. 911; State v. Butler, 178 Mo. 272, 77 S. W. 560; Devlin v. New York, 4 Misc. (N. Y.) 106, 23 N. Y. S. 888.

⁶ Yee Gee, In re, 83 Fed. 145; State v. Graham, 96 Mo. 120, 8 S. W. 911; State v. Meysenburg, 171 Mo. 1, 71 S. W. 229; but under the Missouri statute against offering a gift to influence a juror, an actual tender thereof is not required to be shown; State v. Woodward, 182 Mo. 391, 81 S. W. 857.

⁷ People v. Fong Ching, 78 Cal.

169, 20 Pac. 396; Commonwealth v. Donovan, 170 Mass. 228, 49 N. E. 104; State v. Geyer, 3 Ohio N. P. 242, 3 Ohio Leg. N. 431; Commonwealth v. Petroff, 2 Pearson (Pa.) 534, 8 Wkly. Notes Cas. (Pa.) 212; State v. Smith, 72 Vt. 366, 48 Atl. 647.

⁸ Johnson v. Commonwealth, 90 Ky. 53, 13 S. W. 520.

⁹ People v. Jaehne, 103 N. Y. 182, 8 N. E. 374; Diggs v. State, 49 Ala. 311; Messer v. State, 37 Tex. Cr. App. 635, 40 S. W. 488; but see, State v. Wynne, 118 N. Car. 1206, 24 S. E. 216, and compare, State v. McDonald, 106 Ind. 233, 6 N. E. 607.

sufficient in such a case if the agreement to accept a bribe is proved with some person, no matter whom.¹⁰

§ 2901. Intent.—Although proof of a corrupt intent alone is not sufficient to support a prosecution for bribery, yet when such intent is manifested by overt acts, such as a promise to give the officer a reward as a premium to induce him to act contrary to his duty, proof of that fact is generally sufficient.¹¹ But while it may be inferred from circumstances, yet if a corrupt intent on the part of the officer receiving or of the person offering a bribe is essential to constitute the crime it must be made to appear beyond a reasonable doubt.¹² It has also been held that where the charge is for receiving money for a promise not to perform a duty required by statute, evidence on the part of the defendant of his ignorance of the duty is relevant and material as tending to support his claim that he made no promise not to perform the statutory duty.¹³

§ 2902. Evidence for prosecution—Other acts of accused.—It is usually competent to show the various steps taken by the accused in committing the crime, including preliminary negotiations with the other parties,¹⁴ to the unlawful transaction and his acts subsequent to the offense charged, which tend to confirm that charge, by showing that he carried out his promise or did what was naturally to be expected if bribed as alleged, or the like.¹⁵ Other acts of bribery remote in time and unconnected with the offense charged are inadmissible in evidence,¹⁶ but where the prosecution is for offering to bribe an officer,

¹⁰ *People v. O'Neil*, 109 N. Y. 251, 16 N. E. 68.

¹¹ *People v. Markham*, 64 Cal. 157, 30 Pac. 620, 49 Am. R. 700.

¹² *State v. Pritchard*, 107 N. Car. 921, 12 S. E. 50; see also, *People v. Kerr*, 6 N. Y. S. 674; *White v. State*, 103 Ala. 72, 16 So. 63, compare, *Commonwealth v. Murray*, 135 Mass. 530.

¹³ *Newman v. People*, 23 Colo. 300, 47 Pac. 278. But it was also held that ignorance of the law would not constitute a defense.

¹⁴ *State v. Durnam*, 73 Minn. 150, 75 N. W. 1127; *State v. Smith*, 72 Vt. 366, 48 Atl. 647; see also, *State*

v. Meysenburg, 171 Mo. 1, 71 S. W. 229.

¹⁵ *State v. Gardner*, 88 Minn. 130, 92 N. W. 529; *People v. O'Neil*, 109 N. Y. 251, 16 N. E. 68; *People v. Kerr*, 6 N. Y. S. 674; but see, *People v. Bissert*, 71 App. Div. (N. Y.) 118 75 N. Y. S. 630.

¹⁶ *People v. Sharp*, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. 851; *Guthrie v. State*, 16 Neb. 667, 21 N. W. 455; see also, *State v. Gardner*, 88 Minn. 130, 92 N. W. 529; *State v. Meysenburg*, 171 Mo. 1, 71 S. W. 229; *People v. Hurley*, 126 Cal. 351, 58 Pac. 814.

subsequent offers made to the same officer, or bribes in regard to the same subject matter, or part of the same system are admissible.¹⁷ And it may be said generally with some degree of accuracy that all proper testimony going to show that one charged with receiving a bribe did actually receive it is admissible.¹⁸ But on the trial of a prosecution for offering a witness a bribe to testify that he had seen some persons attack the person accused of murder, and that "the latter had shot in among them," it was held error to permit the introduction by the prosecution in the bribery case of all the details of the arrest of the accused and his conduct, such as that the alleged murderer attempted to shoot the officer, had several pistols in his possession and wore a coat of mail, although it was competent to introduce evidence of the general nature of the crime in connection with which the offer was made, in order to prove the materiality of the alleged false testimony.¹⁹

§ 2903. Documentary evidence.—A legislative journal has been held admissible to show the pendency of the matter with regard to which a member of the legislature was charged with bribery;²⁰ and so has the record of a case in which the defendant was charged with attempted bribery of jurors, to show that the cause was pending,²¹ and that the jurors served in such case.²² So, it has been held proper to introduce a previous indictment for the same offense, which was quashed, to show that the pending prosecution is not barred by the statute of limitations.²³ So, a letter to the accused bearing upon and relevant to the question of bribery is admissible in evidence, where a witness testified that the accused showed it to him, and stated that warrants therein listed were issued by him in consideration of money received from the person in whose favor they were issued.²⁴ And where the charge was for offering to receive a bribe, letters from an agent to his employer communicating the facts bearing upon the issue, being an incident of the business, and contemporaneous therewith, were admitted as a part of the *res gestae*.²⁵

¹⁷ *Rath v. State*, 35 Tex. Cr. App. 142, 33 S. W. 229; *Guthrie v. State*, 16 Neb. 667, 672, 21 N. W. 455.

¹⁸ *People v. McGarry*, (Mich.) 99 N. W. 147.

¹⁹ *People v. Fong Ching*, 78 Cal. 169, 20 Pac. 396.

²⁰ *State v. Smalls*, 11 S. Car. 262.

²¹ *White v. State*, 103 Ala. 72, 16 So. 63.

²² *People v. Northey*, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129.

²³ *White v. State*, 103 Ala. 72, 16 So. 63.

²⁴ *Glover v. State*, 109 Ind. 391, 10 N. E. 282.

²⁵ *State v. Desforbes*, 48 La. Ann. 73, 18 So. 912; see also, *State v. Durnam*, 73 Minn. 150, 75 N. W. 1127.

§ 2904. **Financial dealings of parties.**—On the trial of a prosecution for accepting a bribe the business conditions and financial transactions of the accused may be shown.²⁶ So, in a prosecution for giving a bribe, evidence is admissible to show that, at about the time of the alleged bribery, the corporation, in whose interest the bribe was given, raised the required amount of money, for which there was no apparent necessity for legitimate purposes, and that it failed to account therefor, and the money did not appear to have been used for legitimate ends, and that the alleged receiver of the bribe shortly after the transaction paid off a large mortgage with bills of a large denomination.²⁷

§ 2905. **What need not be proved—Variance.**—Under a statute making it an offense to offer a gift to corruptly influence a juror, it has been held unnecessary to prove an actual tender of the gift.²⁸ So, on the trial of a prosecution for giving a bribe, it has been held unnecessary to prove that the person bribed made any promise as to his future action.²⁹ Something of value must usually be shown to have been given, offered or tendered,³⁰ but it is not necessary to prove the value of the bribe precisely as laid in the indictment.³¹ It is generally sufficient merely to prove that it is of some value.³² But the variance in the description of the alleged bribe may be so great as to be fatal.³³ It has also been held that evidence that the bribe was paid on some day or about the time charged, although not on the exact day, is sufficient.³⁴ And it is not necessary to introduce record evidence as to the election or appointment and qualification of the officer charged to have been bribed by the accused.³⁵

²⁶ *People v. O'Neil*, 109 N. Y. 251, 16 N. E. 68; *State v. Smalls*, 11 S. Car. 262; but see where they covered long period, *People v. Stephenson*, 91 Hun (N. Y.) 613, 36 N. Y. S. 595.

²⁷ *People v. Kerr*, 6 N. Y. S. 674; see also, *People v. McGarry*, (Mich.) 99 N. W. 147.

²⁸ *State v. Miller*, 182 Mo. 370, 81 S. W. 867; *State v. Woodward*, 182 Mo. 391, 81 S. W. 857.

²⁹ *Commonwealth v. Donovan*, 170 Mass. 228, 49 N. E. 104.

³⁰ *Watson v. State*, 39 Ohio St. 123; *People v. Kerr*, 6 N. Y. S. 674.

³¹ *Diggs v. State*, 49 Ala. 311; *Watson v. State*, 39 Ohio St. 123; *People v. Salsbury*, (Mich.) 96 N. W. 936.

³² *Commonwealth v. Donovan*, 170 Mass. 228, 49 N. E. 104; see also, *People v. Salsbury*, (Mich.) 96 N. W. 936.

³³ *State v. Meysenburg*, 171 Mo. 1, 71 S. W. 229.

³⁴ *People v. McGarry*, (Mich.) 99 N. W. 147.

³⁵ *Rath v. State*, 35 Tex. Cr. App. 142, 33 S. W. 229.

§ 2906. **Accomplices—Decoys—Conspirators.**—The fact that a witness is a paid “spotter” or has acted as a detective or decoy apparently entering into the criminal plan for the purpose of detecting and exposing it does not itself render his evidence unworthy of belief as a matter of law,³⁶ but it has been held that the defendant may fully cross-examine him as to his connection with the case, and as to the names of all who were concerned in the alleged detection.³⁷ It has also been held that the subsequent disclosure by a detective to his superior officer, in such a case, is admissible to show that he was not in reality an accomplice.³⁸ The general subject of accomplices and corroboration of their evidence is elsewhere treated, and it is sufficient in this connection to refer to a few of the recent cases.³⁹ It is generally necessary, in order to make the declarations of alleged co-conspirators competent and admissible in bribery cases, to show the conspiracy and some connection with the accused as such.⁴⁰ Indeed, even when a conspiracy is shown, such declarations have been held inadmissible against a defendant who is on trial for a separate and distinct offense.⁴¹

§ 2907. **Confessions and admissions.**—The subject of confessions has been fully treated in another volume, but a reference to two or three matters and authorities may not be out of place in this connection. Although here, as elsewhere, the general rule is that there must be evidence of the corpus delicti aside from the confession, yet it has been held that if, in addition to the confessions, there is proof of circumstances which, although they might be susceptible of an innocent construction, are, nevertheless, calculated to suggest the commission of the crime for the explanation of which the confession furnished the key, it should be allowed to go to the jury.⁴² It has also been held that on the trial of a prosecution against a member of the school board for bribery, admissions by him to the effect that he had drawn warrants for certain amounts at certain times, such admissions being endorsed on the back

³⁶ Wellcome, In re, 23 Mont. 450, 59 Pac. 445.

³⁷ People v. Liphardt, 105 Mich. 80, 62 N. W. 1022.

³⁸ Reg. v. Dewar, 26 Ont. (Can.) 512.

³⁹ See, People v. Bissert, 71 App. Div. (N. Y.) 118, 75 N. Y. S. 630; People v. O’Neil, 109 N. Y. 251, 16

N. E. 68; Rath v. State, 35 Tex. Cr. App. 142, 33 S. W. 229.

⁴⁰ People v. Sharp, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. 851.

⁴¹ State v. Gardner, 88 Minn. 130, 92 N. W. 529.

⁴² People v. Jaehne, 103 N. Y. 182, 8 N. E. 374.

of a letter of inquiry addressed to him, when taken in connection with the other established facts of the case, are competent.⁴³

§ 2908. **Defenses.**—Ignorance of the law is not a defense in bribery cases any more than in other criminal cases, and it has been held that it was no defense for an officer charged with having accepted a bribe under an agreement not to seize gambling devices to show that he was ignorant of a statute making it his duty to seize them; and further, that it was no defense that the prosecuting witness gave the bribe and procured such omission of duty.⁴⁴ Nor can the officer question the constitutionality of the statute,⁴⁵ or the like. Evidence of good character and reputation is admissible in a prosecution for bribery, but it is no defense to the crime where the proof establishes its commission by the accused as a fact.⁴⁶ It is not competent for a witness to testify that he had learned, since the arrest of the accused, that his reputation before his arrest was bad.⁴⁷ In a prosecution for bribery where a specific intent is the essence of the crime intoxication may be shown in a proper case, and if drunkenness is set up as a defense in such a case the character and extent of the drunkenness, the conduct of the defendant and any other facts tending to show that he did not know what he was doing may generally be shown, and the question left to the jury.⁴⁸ But to permit another witness to state that the accused was so drunk that he did not know what he was doing would be in violation of the rule forbidding witnesses to state mere opinions or conclusions which are for the jury to draw.⁴⁹

⁴³ *Glover v. State*, 109 Ind. 391, 10 N. E. 282.

⁴⁴ *Newman v. People*, 23 Colo. 300, 47 Pac. 278; see also as to instigation by others being no defense, *People v. Liphardt*, 105 Mich. 80, 62 N. W. 1022.

⁴⁵ *Newman v. People*, 23 Colo. 300, 47 Pac. 278; *State v. Gardiner*, 54 Ohio St. 24, 42 N. E. 999, 31 L. R. A. 660; see also, *State v. Duncan*, 153 Ind. 318, 54 N. E. 1066; *Glover*

v. State, 109 Ind. 391, 10 N. E. 282; *Gilchrist v. Schmidling*, 12 Kans. 263; *Moseley v. State*, 25 Tex. App. 515, 8 S. W. 652.

⁴⁶ *Wellcome, In re*, 23 Mont. 450, 59 Pac. 445.

⁴⁷ *People v. Fong Ching*, 78 Cal. 169, 20 Pac. 396.

⁴⁸ *White v. State*, 103 Ala. 72, 16 So. 63.

⁴⁹ *White v. State*, 103 Ala. 72, 16 So. 63.

CHAPTER CXXXVIII.

BURGLARY.

Sec.	Sec.
2909. Generally—Definition and elements.	2913. Evidence as to dwelling house and ownership.
2910. Burden of proof and presumptions.	2914. Evidence as to time.
2911. Questions of law or fact.	2915. Evidence as to intent.
2912. Evidence of breaking and entering.	2916. Identification.
	2917. Other offenses.
	2918. Possession of stolen property.
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§ 2909. **Generally—Definition and elements.**—Burglary is the breaking and entering the house of another in the night-time with the intent to commit a felony, whether the felony is actually committed or not.¹ The elements to be proved at common law are: A felonious breaking and entering; that the building was a dwelling-house; that the act occurred in the night-time; an intention to commit some felony in the house.² But under many of the modern statutes other buildings are included, as well as dwelling-houses, and under some of them the breaking and entry may be in the day-time as well as at night, while, under others, a breaking is not essential.

§ 2910. **Burden of proof and presumptions.**—The presumption of innocence existing, the burden is upon the prosecution to show the guilt of the accused beyond a reasonable doubt,³ and, according to the better and prevailing rule, this burden remains upon the prosecution throughout the trial.⁴ The prosecution must, in the absence of a stat-

¹ Russell Crimes, 1; Anderson v. State, 48 Ala. 665, 666, 17 Am. R. 36; McVey, In re, 50 Neb. 481, 70 N. W. 51; 2 Am. St. 383, note.

² See, State v. Wilson, 1 N. J. L. 502, 1 Am. Dec. 216, and authorities cited in notes to the next section; also, see 2 Am. St. 383, note.

³ People v. Winters, 93 Cal. 277, 28 Pac. 946; People v. Flynn, 73

Cal. 511, 15 Pac. 102; State v. Morris, 47 Conn. 179; State v. Manluff, 1 Houst. (Del.) 208; Farley v. State, 127 Ind. 419, 26 N. E. 898; Coleman v. State, 26 Tex. App. 252, 9 S. W. 609.

⁴ Farley v. State, 127 Ind. 419, 26 N. E. 898, and other authorities cited in last note, supra; for a further consideration of this general

ute making a change in the elements of the crime, show that the building burglarized was a dwelling-house, or at least that it was within the curtilage.⁵ But whether the particular building in question was within the curtilage has been held to be a question of fact for the jury.⁶ So, the gist of the offense of burglary usually being the breaking and entering,⁷ that element must also be established beyond a reasonable doubt.⁸ And the burden is upon the prosecution not only to prove the burglarious entry, but also to show that such entry was made with intent to commit a felony as alleged.⁹ So, if the statute does not make

rule, see, Vol. I, §§ 95. 126; *State v. Brady*, (Iowa) 91 N. W. 801, 805.

⁵ *Moore v. People* 47 Mich. 639, 11 N. W. 415; *State v. Fisher*, 1 Pen. (Del.) 303, 41 Atl. 208. But it has been held that actual residence therein at the time of the alleged burglary need not be shown; *Schwabacher v. People*, 165 Ill. 618, 46 N. E. 809; *State v. Meerhouse*, 34 Mo. 344, 86 Am. Dec. 109; but compare the second case cited in this note. In, *Holland v. State*, (Tex. Cr. App.) 74 S. W. 763, evidence that the defendant burglarized a room in a hotel in which the prosecuting witness resided was held sufficient under an indictment charging that it was a private residence. See generally, 2 Am. St. 388, et seq.

⁶ *Wait v. State*, 99 Ala. 164, 13 So. 584; as to what is considered within the curtilage generally, see, *State v. Bugg*, 66 Kans. 668, 72 Pac. 236; *Shotwell v. State*, 43 Ark. 345; *People v. Griffith*, (Mich.) 95 N. W. 719; *Fisher v. State*, 43 Ala. 17; *Rex v. Garland*, 1 Leach C. C. 144; 4 Blackstone Comm. 225; 1 Hale P. C. 558, § 9; 8 Am. & Eng. Ency. of Law (2d ed.) 527; ante, Chap. 132.

⁷ *State v. Hutchinson*, 111 Mo. 257, 20 S. W. 34.

⁸ *Lester v. State*, 106 Ga. 371, 32 S. E. 335; *Lowder v. State*, 63 Ala.

143, 35 Am. R. 9; *Washington v. State*, 21 Fla. 328; *White v. State*, 51 Ga. 285; *People v. McCord*, 76 Mich. 200, 42 N. W. 1106; *State v. Warford*, 106 Mo. 55, 16 S. W. 886, 27 Am. St. 322; *McGrath v. State*, 25 Neb. 780, 41 N. W. 780; *State v. Cowell*, 12 Nev. 337; but proof of very slight force may sustain conviction; *May v. State*, 40 Fla. 426, 24 So. 498; *Sims v. State*, 136 Ind. 358, 36 N. E. 278; *State v. Reid*, 20 Iowa 413; *State v. Herbert*, 63 Kans. 516, 66 Pac. 235; *State v. Warford*, 106 Mo. 55, 16 S. W. 886, 27 Am. St. 322; and, as will hereafter appear, it is sufficient in some cases to show a constructive breaking.

⁹ *People v. Crowley*, 100 Cal. 478, 35 Pac. 84; *People v. Hope*, 62 Cal. 291; *State v. Carpenter*, Houst. Cr. (Del.) 367; *State v. Fisher*, 1 Pen. (Del.) 303, 41 Atl. 208; *Davis v. State*, 22 Fla. 633; *Schwabacher v. People*, 165 Ill. 618, 46 N. E. 809; *State v. Carroll*, 13 Mont. 246, 33 Pac. 688; *State v. Green*, 15 Mont. 424, 39 Pac. 322; *State v. Cowell*, 12 Nev. 337; *Coleman v. State*, 26 Tex. App. 252, 9 S. W. 609; *Walton v. State*, 29 Tex. App. 163, 15 S. W. 646; *Mitchell v. State*, 33 Tex. Cr. App. 575, 28 S. W. 475; see also, *Starchman v. State*, 62 Ark. 538, 36 S. W. 940; *Rush v. State*, 114 Ga. 113, 39 S. E. 941.

a breaking and entering by daylight burglary, it must also be shown beyond a reasonable doubt that the breaking and entering were done in the night-time.¹⁰ As will be shown hereafter, however, circumstantial as well as direct evidence may be sufficient to establish one or more of these various elements in the particular case.

§ 2911. Questions of law or fact.—The question as to whether the essential elements exist in the particular case is usually for the jury to determine from the evidence, including such proper inferences as may be drawn therefrom. Thus, it is for the jury to determine whether the act was done in the night-time.¹¹ So, the identity of the accused and of the property, the intent, and the like, are questions of fact for the jury.¹² But the court should instruct as to what are the necessary elements of the crime and as to what is meant by them or what is necessary in law to constitute the crime.¹³

§ 2912. Evidence of breaking and entering.—In order to prove a breaking and entering, it is generally necessary to show that the house was closed,¹⁴ and evidence of the condition of the premises shortly before and after the commission of the alleged offense is usually competent. Thus, evidence that a window or door was found open at the time and that it had been left closed shortly before has been held suffi-

¹⁰ *People v. Flynn*, 73 Cal. 511, 15 Pac. 102; *People v. Taggart*, 43 Cal. 81; *Waters v. State*, 53 Ga. 567; *State v. Frahm*, 73 Iowa 355, 35 N. W. 451; *People v. Bielfus*, 59 Mich. 576, 26 N. W. 771; *Ashford v. State*, 36 Neb. 38, 53 N. W. 1036; see also, *Adams v. State*, 31 Ohio St. 462; *Reg. v. Nicholas*, 1 Cox Cr. Cas. 218.

¹¹ *State v. Leaden*, 35 Conn. 515; *People v. Taylor*, 93 Mich. 638, 53 N. W. 777; *Davis v. State*, 3 Coldw. (Tenn.) 77; see also, *State v. Whit*, 4 Jones L. (N. Car.) 349.

¹² *Commonwealth v. Chilson*, 2 Cush. (Mass.) 15; *People v. Smith*, 92 Mich. 10, 52 N. W. 67; *State v. Williamson*, 42 Conn. 261; *State v. Bell*, 29 Iowa 316; *People v. Winters*, 93 Cal. 277, 28 Pac. 946; *Schwabacher v. People*, 155 Ill. 618, 46 N.

E. 809; *Green v. State*, (Tex. Cr. App.) 58 S. W. 99.

¹³ *Rose v. Commonwealth*, 19 Ky. L. R. 272, 40 S. W. 245.

¹⁴ *Kelly v. State*, 82 Ga. 441; *Green v. State*, 68 Ala. 539; *State v. Groning*, 33 Kans. 18, 4 Pac. 446; *McGrath v. State*, 25 Neb. 780, 41 N. W. 780; *Washington v. State*, 21 Fla. 328; *People v. McCord*, 76 Mich. 200, 42 N. W. 1106; *Jones v. State*, 25 Tex. App. 226. Drawing a bolt, lifting a latch or opening with a key has been held sufficient evidence of a breaking. *Kent v. State*, 84 Ga. 438, 11 S. E. 355; *State v. O'Brien*, 81 Iowa 93, 46 N. W. 861; *State v. Scripture*, 42 N. H. 485; *Hale P. C.* 553; see also, *Sims v. State*, 136 Ind. 358, 36 N. E. 278.

cient evidence of a breaking.¹⁵ It has also been held competent to show that shoes or clothing belonging to the accused were found near by, and that, from appearances, force had been used to gain an entrance.¹⁶ And circumstantial evidence has been held sufficient in other cases to show both a breaking¹⁷ and an entry.¹⁸ The entrance must have been without the owner's consent, and circumstantial evidence has been held insufficient to show that he did not consent, in a few cases where the owner was present, and was a witness and did not testify upon the subject.¹⁹ But, ordinarily, it may be shown by circumstantial evidence.²⁰

§ 2913. Evidence as to dwelling-house and ownership.—As already shown, the prosecution must prove that the building entered was a dwelling-house, or such a building as to come within the statute. Evidence is therefore competent as to the character and ownership of the premises.²¹ So, unless the statute is such as to make a variance as to the ownership of the premises immaterial, it must generally be proved as charged.²² But the ownership or value of property stolen or the like by the burglar is generally immaterial, and need not be proved precisely as alleged.²³

¹⁵ *People v. Curley*, 99 Mich. 238, 58 N. W. 68; *State v. Warford*, 106 Mo. 55, 16 S. W. 886.

¹⁶ *Fort v. State*, 52 Ark. 180, 11 S. W. 959; *England v. State*, 89 Ala. 76, 8 So. 146; *People v. Block*, 60 Hun (N. Y.) 583, 15 N. Y. S. 229.

¹⁷ *Holland v. State*, 112 Ga. 540, 37 S. E. 887; *Commonwealth v. Hagan*, 170 Mass. 571, 49 N. E. 922; *State v. Christmas*, 101 N. Car. 749, 8 S. E. 361; *State v. Bee*, 29 S. Car. 81, 6 S. E. 911; *United States v. Lantry*, 30 Fed. 232.

¹⁸ *State v. Watkins*, 11 Nev. 30; for other cases in which the evidence was held sufficient to show a breaking and some in which it was held insufficient, see, 2 Am. St. 383-387, note.

¹⁹ *Ridge v. State*, (Tex.) 66 S. W. 774; see also, *Wisdom v. State*, (Tex.) 61 S. W. 926; *People v. Caniff*, 2 Park. Cr. Cas. (N. Y.) 586.

²⁰ *State v. Hayes*, 105 Mo. 76, 16 S. W. 514; *Hurley v. State*, 35 Tex. Cr. App. 359, 33 S. W. 354.

²¹ *Houston v. State*, 38 Ga. 165.

²² *Jackson v. State*, 102 Ala. 167, 15 So. 344; *Berry v. State*, 92 Ga. 47, 17 S. E. 1006; *Rodgers v. People*, 86 N. Y. 360, 40 Am. R. 548; *Doan v. State*, 26 Ind. 495; *State v. McCarthy*, 17 R. I. 370, 22 Atl. 282; *James v. State*, 77 Miss. 370, 26 So. 929, 78 Am. St. 527; *State v. Hill*, 48 W. Va. 132, 35 S. E. 831.

²³ *State v. Tyrrell*, 98 Mo. 354, 11 S. W. 734; *State v. Hutchinson*, 111 Mo. 257, 20 S. W. 34; *Brown v. State*, 72 Miss. 990, 18 So. 431; *McCrary v. State*, 96 Ga. 348, 23 S. E. 409; *Reg. v. Clarke*, 1 Car. & Kir. 421, 47 E. C. L. 421; admissions of such evidence held harmless; *Farley v. State*, 127 Ind. 419, 26 N. E. 898; *Pyland v. State*, 33 Tex. Cr. App. 382, 26 S. W. 621.

§ 2914. **Evidence as to time—Preparations.**—As already stated, at common law, and except where the rule is changed by statute, it must be shown that the breaking and entering occurred in the night-time.²⁴ It is held, however, that evidence that features were discernible by artificial light, or by moonlight, will not avail the accused.²⁵ But an almanac has been admitted, although rather to refresh the memory of the court and jury than as evidence, as to the time the sun set upon the day in question.²⁶ It is said that proof of a breaking in one night and an entrance the following night will sustain a conviction.²⁷ If the evidence leaves the exact time in doubt, and it cannot be ascertained whether the breaking in was in the night-time or not, the prisoner should have the benefit of the doubt.²⁸ But the time may be shown by circumstantial evidence.²⁹ Evidence that the accused had made preparations to commit a burglary and had endeavored to induce the custodian of the premises to absent himself, or had produced burglar's tools,³⁰ and had been seen lurking about the premises,³¹ or had made inquiries as to property which was in the house,³² or as to the character, financial circumstances and habits of its inmates, has been held admissible.³³

²⁴ *Ashford v. State*, 36 Neb. 38, 40, 53 N. W. 1036; *People v. Flynn*, 73 Cal. 511, 15 Pac. 102; *People v. Griffin*, 19 Cal. 578; *State v. Seymour*, 36 Me. 225, 227; *State v. Leaden*, 35 Conn. 515; *Guynes v. State*, 25 Tex. App. 584, 8 S. W. 667; *Waters v. State*, 53 Ga. 567; *Allen v. State*, 40 Ala. 334; *Commonwealth v. Glover*, 111 Mass. 395, 402; *People v. Bielfus*, 59 Mich. 576, 26 N. W. 771; as to what is considered night-time under this rule, see, 4 *Blackstone Comm.* 224; 3 *Coke Inst.* 63; *State v. Bancroft*, 10 N. H. 105. The statute sometimes defines it. *Reg. v. Polly*, 1 Car. & Kir. 77, 47 E. C. L. 77; *Commonwealth v. Williams*, 2 Cush. (Mass.) 582.

²⁵ *State v. Morris*, 47 Conn. 179; *State v. McKnight*, 111 N. Car. 690, 692, 16 S. E. 319; *Commonwealth v. Kaas*, 3 Brewst. (Pa.) 422; *State v. Bancroft*, 10 N. H. 105, 107; 2 *East P. C.* 509; 1 *Hale P. C.* 550.

²⁶ *State v. Morris*, 47 Conn. 179.

²⁷ *Rex v. Smith*, Russ. & Ry. 417; see also, *Commonwealth v. Glover*, 111 Mass. 395.

²⁸ *Waters v. State*, 53 Ga. 567.

²⁹ *Houser v. State*, 58 Ga. 78; *State v. Bancroft*, 10 N. H. 105; *State v. Taylor*, 37 La. Ann. 40.

³⁰ *People v. Calvert*, 67 Hun (N. Y.) 649, 22 N. Y. S. 220.

³¹ *State v. Turner*, 106 Mo. 272, 17 S. W. 304.

³² *Gilmore v. State*, 99 Ala. 154, 13 So. 536.

³³ *Underhill Cr. Ev.*, § 371; *State v. Ward*, 103 N. Car. 419, 423, 8 S. E. 814. But it has been held that proof that the value of the property in the house was small does not admit evidence that the accused is a man of large means and in good circumstances. *Coates v. State*, 31 Tex. Cr. App. 257, 261, 20 S. W. 585.

§ 2915. Evidence as to intent.—Where a felony is actually committed by the defendant in the house broken into and entered by him there could not well be better evidence of his felonious intent than the proof of the commission of such felony.³⁴ But it may also be shown by other facts and circumstances, or by some act or declaration of the defendant.³⁵ Thus, where the accused, having broken and entered the house, is discovered collecting articles of value or ransacking a trunk,³⁶ or where he immediately fled from the house, on being surprised, or clothing was found placed in a bundle outside the house,³⁷ or the like,³⁸ evidence thereof is admissible and may well justify an inference of felonious intent. But the inference thus arising may be rebutted, and proper evidence is admissible in behalf of the accused to explain his actions and rebut the criminating circumstances.³⁹

§ 2916. Identification—Burglarious tools.—Direct evidence is, of course, admissible, in a proper case, to identify the prisoner, and, as elsewhere shown, ordinary witnesses may testify as to the identity of persons or things even though such testimony partakes of the nature of a conclusion or an opinion.⁴⁰ So, real evidence and an inspection or physical examination may be permitted, in some jurisdictions at least, for the purpose of identification.⁴¹ And the identity of the

³⁴ *Jones v. State*, 18 Fla. 889; *Stokes v. State*, 84 Ga. 258, 10 S. E. 740; *Speers v. Commonwealth*, 17 Gratt. (Va.) 570; 2 East P. C. 520, note.

³⁵ *Steadman v. State*, 81 Ga. 736, 8 S. E. 420; *McComb v. Commonwealth*, 11 Ky. L. R. 508, 12 S. W. 382; *State v. Worthen*, 111 Iowa 267, 82 N. W. 910; *State v. Maxwell*, 42 Iowa 208; *People v. Marks*, 4 Park. Cr. Cas. (N. Y.) 153; *Alexander v. State*, 31 Tex. Cr. App. 359, 20 S. W. 756; *Commonwealth v. Shedd*, 140 Mass. 451, 5 N. E. 254; *Feister v. People*, 125 Ill. 348, 17 N. E. 748; *Burrows v. State*, 84 Ind. 529; *People v. Morton*, 4 Utah 407, 11 Pac. 512; *State v. Caddle*, 35 W. Va. 73, 12 S. E. 1098.

³⁶ *Clifton v. State*, 26 Fla. 523, 7

So. 863; *State v. Anderson*, 5 Wash. 350, 31 Pac. 969.

³⁷ *People v. Curley*, 99 Mich. 238, 58 N. W. 68.

³⁸ *State v. McBryde*, 97 N. Car. 393, 1 S. E. 925; *Hill v. Commonwealth*, 12 Ky. L. R. 914, 15 S. W. 870; see also, *Alexander v. State*, 31 Tex. Cr. App. 359, 20 S. W. 756; *Steadman v. State*, 81 Ga. 736, 8 S. E. 420; 2 Am. St. 396, 397, note; but see, *Hamilton v. State*, 11 Tex. App. 116; *Rush v. State*, 114 Ga. 113, 39 S. E. 941.

³⁹ *People v. Griffin*, 77 Mich. 585, 43 N. W. 1061; *State v. Meche*, 42 La. Ann. 273, 7 So. 573; *State v. Fox*, 80 Iowa 312, 45 N. W. 874, 20 Am. St. 425.

⁴⁰ Vol. I, § 680.

⁴¹ See, Vol. II, §§ 1014, 1221, 1223, 1231, 1232.

prisoner as the person who committed the burglary, may be shown by circumstantial evidence⁴² as well as by direct evidence. Even a closely connected collateral crime or offense may be shown in a proper case for this purpose.⁴³ And, as will hereafter be shown, possession of stolen goods or the fruits of the crime may likewise be shown in a proper case upon this question as well as for other purposes.⁴⁴ The possession of burglarious tools and instruments with which the crime was committed is also relevant, and may be shown, especially with other evidence tending to connect the accused with the offense.⁴⁵ So, evidence of footprints found near the place of the crime shortly after the burglary similar to those made by him,⁴⁶ or of an article of clothing or the like found at the scene of the crime and shown to have belonged to him, is usually competent and admissible as tending to show his presence there at the time of the commission of the crime.⁴⁷

§ 2917. **Other offenses.**—In prosecutions for burglary as in other cases, the general rule is that the prosecution cannot prove the commission by the defendant or others of other burglaries, or offenses, not in any way connected with the particular crime charged in the indictment.⁴⁸ But evidence of another burglary than that charged, or of any

⁴² *State v. Manluff*, Houst. Cr. (Del.) 208; *Maroney v. State*, 8 Minn. 218; *Johnson v. Commonwealth*, 29 Gratt. (Va.) 796; Vol. I, § 174; see also, *State v. Robertson*, 111 La. Ann. 35, 35 So. 375.

⁴³ Vol. I, § 174, note 201*; see also, *Perry v. State*, (Tex. Cr. App.) 78 S. W. 513.

⁴⁴ *Walker v. State*, 97 Ala. 85, 12 So. 83; *State v. Groning*, 33 Kans. 18, 5 Pac. 446; *Jackson v. State*, 28 Tex. App. 370, 13 S. W. 451; *Woodruff v. State*, (Tex.) 20 S. W. 573; *State v. Hullen*, 133 N. Car. 656, 45 S. E. 513.

⁴⁵ *White v. People*, 179 Ill. 356, 58 N. E. 570; *Commonwealth v. Williams*, 56 Mass. 582; *State v. Franks*, 64 Iowa 39, 19 N. W. 832; *People v. Hope*, 62 Cal. 291; *State v. Haynes*, 7 N. Dak. 70, 72 N. W. 923; see also, *People v. Larned*, 7 N. Y. 445; *Bruen v. People*, 206 Ill. 417, 69 N. E. 24.

⁴⁶ *Gilmore v. State*, 99 Ala. 154, 13 So. 536; see also, *Cooper v. State*, 88 Ala. 107, 7 So. 47; *Miller v. State*, 91 Ga. 186, 16 S. E. 985; *People v. Wolcott*, 51 Mich. 612, 17 N. W. 78; *Commonwealth v. Pope*, 103 Mass. 440; *State v. Reitz*, 83 N. Car. 634. And on the other hand the accused may show that he could not have made the tracks. *State v. Melick*, 65 Iowa 614, 22 N. W. 895.

⁴⁷ *People v. Rowell*, 133 Cal. 39, 65 Pac. 127; see also, *People v. Flynn*, 73 Cal. 511, 15 Pac. 102, with which however, compare, *People v. Cronk*, 40 App. Div. (N. Y.) 206, 58 N. Y. S. 13.

⁴⁸ Vol. I, § 175; *People v. McNutt*, 64 Cal. 116, 28 Pac. 64; *Roberson v. State*, 40 Fla. 509, 24 So. 474; *State v. Johnson*, 38 La. Ann. 686; *People v. Henry*, 129 Mich. 100, 88 N. W. 77; *State v. Hale*, 156 Mo. 102, 56 S. W. 881; *Swan v. Common-*

other offense, is admissible, if both offenses are in reality parts of the same transaction or otherwise connected within the exception elsewhere stated, or if it shows the whereabouts of the defendant at the time alleged in the indictment, or otherwise tends to show a regular organized system or to connect him with the offense charged, so as to fall within such exception.⁴⁹ Evidence of other burglaries and larcenies by the defendant at the same place, or in a different house, at about the same time, may also be admissible on the question of intent.⁵⁰ But the defendant cannot ordinarily show that other burglaries were committed at about the same time as that with which he is charged,⁵¹ although there are instances in which he may show that some one else, and not he, committed the crime in question.

§ 2918. Possession of stolen property.—The effect of evidence of recent possession of stolen property has already been considered, and while it is universally conceded that such evidence is admissible in a proper case, much the same conflict among the authorities exists in regard to whether such evidence of itself raises any true presumption of guilt in cases of burglary as in other cases, although the conflict is not, perhaps, so great as in cases of larceny. The better and prevailing rule seems to be that stated in a recent case⁵² substantially as

wealth, 104 Pa. St. 218; *Hunt v. State*, (Tex. Cr. App.) 60 S. W. 965; see also, *People v. Greenwall*, 108 N. Y. 296, 15 N. E. 404; *McAnally v. State* (Tex. Cr. App.) 73 S. W. 404.

⁴⁹ See, Vol. I, § 175; Vol. IV, § 2916; also, *Ray v. State*, 126 Ala. 9, 28 So. 634; *Mason v. State*, 42 Ala. 532; *People v. McGilver*, 67 Cal. 55, 7 Pac. 49; *Roberson v. State*, 40 Fla. 509, 24 So. 474; *Frazier v. State*, 135 Ind. 38, 34 N. E. 817; *State v. Wrand*, 108 Iowa 73, 78 N. W. 788; *People v. Mead*, 50 Mich. 228, 15 N. W. 95; *People v. Gibson*, 58 Mich. 368, 25 N. W. 316; *State v. Adams*, 20 Kans. 311; *State v. Fitzsimon*, 18 R. I. 236, 27 Atl. 446, 49 Am. St. 766; *Commonwealth v. Scott*, 123 Mass. 239, 25 Am. R. 81; *State v. Robinson*, 35 S. Car. 340,

14 S. E. 766; *Gass v. State* (Tex. Cr. App.) 56 S. W. 73; *State v. Noris*, 27 Wash. 453, 67 Pac. 983; *Reg. v. Cobden*, 3 F. & F. 833.

⁵⁰ *State v. Franke*, 159 Mo. 535, 60 S. W. 1053; *Osborne v. People*, 2 Park. Cr. Cas. (N. Y.) 583; *Commonwealth v. Shepherd*, 2 Pa. Dist. 345; *State v. Weldon*, 39 S. Car. 318, 17 S. E. 688, 24 L. R. A. 126; *State v. Valwell*, 66 Vt. 558, 29 Atl. 118; but see, *People v. McNutt*, 64 Cal. 116, 28 Pac. 64; *State v. Johnson*, 38 La. Ann. 686; *People v. Henry*, 129 Mich. 100, 88 N. W. 77; *McAnally v. State*, (Tex. Cr. App.) 73 S. W. 404.

⁵¹ *State v. Smarr*, 121 N. Car. 669, 28 S. E. 549; *Roberson v. State*, 40 Fla. 509, 24 So. 474.

⁵² *State v. Brady*, (Iowa) 91 N. W. 801, 803, 805.

follows: There is no legal presumption of guilt of burglary attaching to the mere possession of the stolen goods by the accused; but such fact, if the alleged fact be of recent occurrence, has a tendency to prove his guilt, and, if there be other proved circumstances tending to connect him with the commission of the offense, the fact of possession, thus aided, will sustain a conviction;⁵³ or, in other words, where, independent of the mere possession by the accused of the recently stolen goods, the evidence tends to show that a burglary was committed by some one, and that the theft of the goods was accomplished at the same time, and by means of such burglary, the proof of possession of the fruits of the crime will be sufficient to sustain a conviction of the felonious breaking and entering,⁵⁴ but of itself the mere fact of possession of stolen goods does not create a presumption that the possessor was guilty of burglary.

§ 2919. Defenses.—The same defenses are open to the accused in cases of burglary as in most prosecutions. Thus, he may establish or introduce evidence to prove an alibi, or, in general, he may introduce any competent evidence tending to show that he did not commit the crime with which he is charged.⁵⁵ He may show that he was so drunk at the time of its commission that he could not have committed it.⁵⁶ And

⁵³ Citing, *State v. Powell*, 61 Kans. 81, 58 Pac. 968; *Methard v. State*, 19 Ohio St. 363; *People v. Fagan*, 66 Cal. 534, 6 Pac. 394; *People v. Hannon*, 85 Cal. 374, 24 Pac. 706; *Metz v. State*, 46 Neb. 547, 65 N. W. 190; *Davis v. People*, 1 Park. Cr. Cas. (N. Y.) 447; *State v. Conway*, 56 Kans. 682, 44 Pac. 627; *Ryan v. State*, 83 Wis. 486, 53 N. W. 836; *State v. Graves*, 72 N. Car. 482; *State v. Hodge*, 50 N. H. 510; *Tallafiero v. Commonwealth*, 77 Va. 411; *Falvey v. State*, 85 Ga. 157, 11 S. E. 607; *Stuart v. People*, 42 Mich. 255, 3 N. W. 863; *Brooks v. State*, 96 Ga. 353, 23 S. E. 413; 1 McClain Cr. Law, § 514.

⁵⁴ *Smith v. People*, 115 Ill. 17, 3 N. E. 733; *Langford v. People*, 134 Ill. 444, 25 N. E. 1009; *Magee v. People*, 139 Ill. 138, 28 N. E. 1077;

People v. Wood, 99 Mich. 620, 58 N. W. 638; see also, *King v. State*, 99 Ga. 686, 26 S. E. 480; *Porterfield v. Commonwealth*, 91 Va. 801, 22 S. E. 352; *State v. Blue*, 136 Mo. 41, 37 S. W. 796; *State v. Raymond*, 46 Conn. 345; *Smith v. State*, 58 Ind. 340; *Cavender v. State*, 126 Ind. 47, 25 N. E. 875. The inference is one of fact to be drawn from all the evidence rather than a so-called presumption of law. See also and compare, *State v. Williams*, 120 Iowa 36, 94 N. W. 255, with *State v. Swift*, 120 Iowa 8, 94 N. W. 269.

⁵⁵ See generally, *Grantham v. State*, 95 Ga. 459, 22 S. E. 281; *Price v. People*, 109 Ill. 109; *Robinson v. State*, 53 Md. 151, 36 Am. R. 399.

⁵⁶ *Ingalls v. State*, 48 Wis. 647, 4 N. W. 785; see also, *Schwabacher*

he may generally introduce evidence to show by circumstances, or even testify himself, that his intent was different from that charged.⁵⁷ So, where he has possession of stolen property or the like, or other circumstances indicating or leading to the inference of his guilt have been shown by the prosecution, he may introduce competent evidence to explain his possession or otherwise rebut the evidence of the prosecution.⁵⁸

v. People, 165 Ill. 618, 46 N. E. 809; State v. Bell, 29 Iowa 316; but compare, State v. Shores, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. 875.

⁵⁷ State v. Meche, 42 La. Ann. 273, 7 So. 573; People v. Griffin, 77 Mich. 585, 43 N. W. 1061.

⁵⁸ See, Henderson v. State, 70 Ala. 23, 45 Am. R. 72; Leslie v. State, 35

Fla. 171, 17 So. 555; Roberson v. State, 40 Fla. 509, 24 So. 474; Hays v. State, 30 Tex. App. 472, 17 S. W. 1063; State v. Owsley, 111 Mo. 450, 20 S. W. 194; as to good character and financial circumstances, see, Cavender v. State, 126 Ind. 47, 25 N. E. 875.

CHAPTER CXXXIX.

CONSPIRACY.

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§ 2920. **Generally**—Distinction between civil and criminal conspiracy.—The scope of this chapter is to treat distinctively the rules of proof in criminal conspiracy, avoiding, except incidentally, any treatment of such rules as apply in civil actions for damages occasioned by wrongful or unlawful conspiracies. However, it may be proper in a general and preliminary way to note the distinction between civil and criminal conspiracies. By civil conspiracy is meant such a conspiracy as will furnish a basis for a civil action for dam-

ages. A criminal conspiracy may be complete without in any way affecting or damaging any particular person. But to afford the basis of a civil action for damages the proof must show that the alleged conspiracy was carried out and operated to the injury of the party complaining. A criminal conspiracy when fully executed may also fall within the term civil conspiracy. And it is barely possible that every civil conspiracy has within it some of the characteristics, if not the essential ingredients, of a criminal conspiracy. The dicta of the cases are to the effect that the gist of the criminal conspiracy is the unlawful combination, and the gist of the civil conspiracy is the injury or damage actually done.¹

§ 2921. Definition.—Courts and law writers recognize the difficulty in defining criminal conspiracy. But general definitions are given which may aid in determining the nature and character of the offense, if not regarded as exact in each particular case. The most comprehensive statement and the most generally accepted definition is that it is the combination or conspiracy of two or more persons for the ac-

¹ *Brown v. Jacobs &c. Co.*, 115 Ga. 429, 41 S. E. 553; *Herron v. Hughes*, 25 Cal. 560; *Dowdell v. Carpy*, 129 Cal. 168, 61 Pac. 948; *State v. Rowley*, 12 Conn. 101; *State v. Glidden*, 55 Conn. 46, 8 Atl. 890; *Anderson v. Jett*, (Ky.) 6 L. R. A. 390; *Texas &c. Co. v. Adoue*, 83 Tex. 650, 19 S. W. 274; *Park &c. Co. v. National &c. Asso.*, 30 App. Div. (N. Y.) 508, 52 N. Y. S. 475; *People v. Chicago &c. Gas Co.*, 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497; *McHenry v. Sneer*, 56 Iowa 649, 10 N. W. 234; *Kimball v. Harman*, 34 Md. 407; *Garing v. Fraser*, 76 Me. 37; *Commonwealth v. Waterman*, 122 Mass. 43; *Vege- lahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077; *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011; *Bush v. Sprague*, 51 Mich. 41, 16 N. W. 222; *State v. Donaldson*, 32 N. J. L. 151; *Hutchins v. Hutchins*, 7 Hill (N. Y.) 104; *Adler v. Fenton*, 24 How. (U. S.) 407; *People v. Sheldon*, 139 N. Y. 251, 34 N. E. 785; *State v.*

Younger, 1 Dev. L. (N. Car.) 357; *Laverty v. Vanarsdale*, 65 Pa. St. 507; *Morris Run &c. Co. v. Barclay &c. Co.*, 68 Pa. St. 173, 187; *State v. Stewart*, 59 Vt. 273, 9 Atl. 559; *Boutwell v. Marr*, 71 Vt. 1, 42 Atl. 607; *Smith v. Nippert*, 76 Wis. 86, 44 N. W. 846; *Martens v. Reilly*, 109 Wis. 464, 84 N. W. 840; *United States v. Weber*, 114 Fed. 950; *United States v. Addyston &c. Co.*, 29 C. C. A. 141, 85 Fed. 271; *United States v. Trans-Missouri &c. Asso.*, 166 U. S. 290, 17 Sup. Ct. 540; *United States v. Cassidy*, 67 Fed. 698; *East Nissouri v. Horseman*, 16 U. C. Q. B. 556; *Mogul &c. Co. v. McGregor*, L. R. 21 Q. B. 544; *Huttley v. Sim- mons*, 1 Q. B. (1898) 181; *Rex v. Journeymen Taylors*, 8 Mod. 11; *Savile v. Roberts*, 1 Ld. Raym. 374. 378; see, 1 *Eddy Combinations*, §§ 171, 340; for a collection of au- thorities on the question of civil conspiracy, see, 8 L. R. A. 497, note; 57 L. R. A. 547, note.

complishment of an unlawful purpose; or such a combination or conspiracy of two or more persons to effect a lawful purpose by unlawful methods or means.² Mr. Bishop defines it as follows: "Conspiracy is the corrupt agreeing together of two or more persons to do by concerted action something unlawful, either as a means or as an end. The unlawful thing must be such as would be indictably performed by one alone, or, not being such, be of the nature particularly adapted to injure the public or some individual by reason of the combination."³ The Supreme Court of Massachusetts in an early case recognized the difficulty of accurately defining this crime, and say: "But the great difficulty is in framing any definition or description, to be drawn from the decided cases, which shall specifically identify this offense—a description broad enough to include all cases punishable under this description, without including acts which are not punishable. Without attempting to review and reconcile all the cases, we are of opinion that, as a general description, though perhaps not a precise and accurate definition, a conspiracy must be a combination of two or more persons by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means. We use the terms criminal or unlawful, because it is manifest that many acts are unlawful which are not punishable by indictment or other public prosecution; and yet there is no doubt, we think, that a combination by numbers to do them would be an unlawful conspiracy, and punishable by indictment."⁴ As defined by an inferior court of Ohio, "a conspiracy is a combination of two or more persons by some concert of action to accomplish

² *Clinton v. Estes*, 20 Ark. 216; *Smith v. People*, 25 Ill. 9; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898; *Orr v. People*, 63 Ill. App. 305; *Sparks v. Commonwealth*, 89 Ky. 644, 20 S. W. 167; *State v. Slutz*, 106 La. Ann. 182, 30 So. 298; *State v. Mayberry*, 48 Me. 218; *Ellzey v. State*, 57 Miss. 826; *Commonwealth v. Hunt*, 4 Metc. (Mass.) 111; *Hart v. Hicks*, 129 Mo. 99, 31 S. W. 351; *State v. Davies*, 80 Mo. App. 239; *State v. Kennedy*, 177 Mo. 98, 75 S. W. 979; *State v. Donaldson*, 32 N. J. L. 151; *State v. Burnham*, 15 N. H. 396; *State v. Straw*, 42 N. H. 393; *State v. Stewart*, 59 Vt. 1, 9

Atl. 559; *Boutwell v. Marr*, 71 Vt. 1, 42 Atl. 607; *People v. Flack*, 125 N. Y. 324, 26 N. E. 267; *State v. Crowley*, 41 Wis. 271; *Martens v. Reilly*, 109 Wis. 464, 84 N. W. 840; *Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542; *United States v. Lancaster*, 44 Fed. 896; *United States v. Johnson*, 26 Fed. 682; *United States v. Cassidy*, 67 Fed. 698; *Drake v. Stewart*, 22 C. C. A. 104, 76 Fed. 140; *Wright v. United States*, 48 C. C. A. 37, 108 Fed. 805; *Reg. v. Parnell*, 14 Cox Cr. Cas. 508.

³ 2 Bishop Cr. Law, § 172.

⁴ *Commonwealth v. Hunt*, 4 Metc. (Mass.) 111.

some criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means.”⁵

§ 2922. Statutory conspiracy.—The United States and some of the states have statutes prescribing penalties against conspiracy. But these statutes do not profess to enumerate the acts necessary to constitute the offense; the prohibition under the statute of the United States extends to two or more persons who conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose. Some of these statutes further provide that if one or more of the parties to the conspiracy do any act in carrying out the conspiracy then all the parties to such conspiracy shall be liable. Under such a statute it has been held necessary to prove three elements in order to establish the offense: (1) The act of two or more persons conspiring together; (2) to commit any offense against the United States; (3) the overt act or the doing of any act to effect the object of the conspiracy.⁶ Under such statutes it has been held that it was not essential to state the name of the other persons with whom the defendant conspired, and it was not necessary to allege the acts done.⁷ The decided cases holding the proof sufficient to establish a conspiracy under the statute are better precedents than abstract rules.⁸

§ 2923. Conspiracy not an attempt to commit crime.—A distinction exists between a conspiracy and an attempt to commit a crime. It may be admitted, however, that conspiracy in some of its essential features is very closely akin to an attempt to commit a crime. And it is equally true that in some instances the proof that would support a charge of an attempt would also be sufficient to prove a conspiracy. In discussing the resemblance which a conspiracy bears to an attempt to commit crime the Supreme Court of Connecticut say: “It differs from the common-law attempt, in that it is not merged in the crime intended; if that crime is actually committed, as well as in other respects. But in many cases the separating line between the offense of a conspiracy

⁵ State v. Snell, 2 Ohio N. P. 55; States v. Dunbar, 27 C. C. A. 488, 83 Owens v. State, 84 Tenn. 1; Girdner Fed. 151; United States v. Stevens, v. Walker, 1 Helsk. (Tenn.) 186; 27 Fed. Cas. No. 16392.
3 Greenleaf Ev., § 89.

⁶ United States v. Barrett, 65 Fed. C. A. 488, 83 Fed. 151.
62; United States v. Cassidy, 67 Fed. ⁷ United States v. Dunbar, 27 C. 698; United States v. Benson, 17 ⁸ 8 Cyc. Law & Proc. 628, n. 44.
C. C. A. 293, 70 Fed. 591; United Cases cited.

and of an attempt to commit that crime is one difficult to draw; in some cases the facts may support either offense. Two elements, therefore, enter into the crime of conspiracy: wrongful combination and criminal attempt."⁹ So a joint attempt to commit a crime is not necessarily a conspiracy. It only rises to that degree when the combination is of such a nature and to such an extent as to increase the danger to the public from such an attempt. "It is the special danger to the public from wrongful acts that are accomplished through the force of combination, which has induced the courts to treat an attempt to accomplish such acts through the force of combination as a criminal attempt, although the acts may not be criminal when committed or attempted otherwise than through a wrongful combination for that purpose."¹⁰

§ 2924. Pleading conspiracy.—The rule of pleading on this subject is that it is not necessary to set out the means used when the combination or alleged conspiracy is to do an unlawful act; but the means adopted and used must be fully stated when such combination or conspiracy is to do a lawful act by unlawful means or methods.¹¹ The indictment must show either that the object of the conspiracy or the means employed to accomplish it are criminal.¹²

⁹ *State v. Gannon*, 75 Conn. 206, 52 Atl. 727; *State v. Wilson*, 30 Conn. 500.

¹⁰ *State v. Gannon*, 75 Conn. 206, 52 Atl. 727.

¹¹ *Smith v. People*, 25 Ill. 9; *Musgrave v. State*, 133 Ind. 297, 32 N. E. 885; *State v. Murphy*, 6 Ala. 765, 41 Am. Dec. 79; *State v. Jones*, 13 Iowa 269; *Commonwealth v. Ward*, 92 Ky. 158, 17 S. W. 283; *Commonwealth v. Grinstead*, 108 Ky. 59, 55 S. W. 720; *Commonwealth v. O'Brien*, 12 Cush. (Mass.) 84; *Commonwealth v. Wallace*, 16 Gray (Mass.) 221; *Commonwealth v. Barnes*, 132 Mass. 242; *Commonwealth v. Eastman*, 1 Cush. (Mass.) 223; *Commonwealth v. Fuller*, 132 Mass. 563; *Commonwealth v. Meserve*, 154 Mass. 64, 27 N. E. 997; *State v. Buchanan*, 5 H. & J. (Md.) 317; *State v. Bartlett*, 30 Me. 132;

State v. Roberts, 34 Me. 320; *People v. Richards*, 1 Mich. 216; *Alderman v. People*, 4 Mich. 414; *People v. Clark*, 10 Mich. 310; *People v. Arnold*, 46 Mich. 268, 9 N. W. 406; *People v. Petheram*, 64 Mich. 252, 31 N. W. 188; *People v. Butler*, 111 Mich. 483, 69 N. W. 734; *People v. Dyer*, 79 Mich. 480, 44 N. W. 937; *State v. Parker*, 43 N. H. 83; *Commonwealth v. McKisson*, 8 S. & R. (Pa.) 420; *Twichell v. Commonwealth*, 9 Pa. St. 211; *Hazen v. Commonwealth*, 23 Pa. St. 355; *State v. De Witt*, 2 Hill (S. Car.) 282; *State v. Noyes*, 25 Vt. 415; *State v. Crowley*, 41 Wis. 271; *Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542; *Wright v. United States*, 48 C. C. A. 37, 108 Fed. 805; 2 Bishop New Cr. Proc., § 204.

¹² *State v. Jones*, 13 Iowa 269; *State v. Bartlett*, 30 Me. 132; *State*

§ 2925. **Pleading—Stating means employed.**—A clear statement of the rule is that in cases where the purpose of the conspiracy itself does not appear to be unlawful or criminal, then a full and exact statement of the means contemplated to carry it out must be stated, and the statement must show that such contemplated means are unlawful or criminal.¹³ The Supreme Court of Wisconsin stated the rule thus: “So the rule of common law is, as regards indictments for criminal conspiracies, that where the crime depends on the object of the conspiracy, that object must be set forth, but the means need not be; but where the crime depends upon the character of the means to be employed, they are material and must be alleged.”¹⁴ Thus, where the purpose of the conspiracy was to cheat and defraud, it was held that the means used or proposed to be used should be set out that the court may know that it was a conspiracy to effect the proposed object by illegal means.¹⁵ On this subject of pleading the Supreme Court of Massachusetts stated the rule thus: “That when the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment; and if the criminality of the offense, which is intended to be charged, consists in the agreement to compass or promote some purpose, not of itself criminal or unlawful, by the use of fraud, force, falsehood, or other criminal or unlawful means, such intended use of fraud, force, falsehood, or other criminal or unlawful means must be set out in the indictment.”¹⁶ But where the object of the conspiracy was to obtain money by false

v. Ripley, 31 Me. 386; Alderman v. People, 4 Mich. 414; People v. Clark, 10 Mich. 310; State v. Burnham, 15 N. H. 396; State v. Noyes, 25 Vt. 415.

¹³ Commonwealth v. Meserve, 154 Mass. 64, 27 N. E. 997; Commonwealth v. Wallace, 16 Gray (Mass.) 221; Commonwealth v. Hunt, 4 Metc. (Mass.) 111; State v. Mayberry, 48 Me. 218; Alderman v. People, 4 Mich. 414; State v. Parker, 43 N. H. 83; State v. Christianbury, 44 N. Car. 46; but see, People v. Richards, 1 Mich. 216; People v. Arnold, 46 Mich. 268, 9 N. W. 406; People v. Butler, 111 Mich. 483, 69 N. W. 734; State v. Crowley, 41 Wis. 271.

¹⁴ Martens v. Reilly, 109 Wis. 464, 84 N. W. 840; State v. Crowley, 41 Wis. 271; People v. Richards, 1 Mich. 216; Rex v. Gill, 2 B. & Ald 204; Reg. v. King, 7 Q. B. 782; Sydeserff v. Reg., 11 Q. B. 245.

¹⁵ Commonwealth v. Eastman, 1 Cush. (Mass.) 189; Commonwealth v. Shedd, 7 Cush. (Mass.) 514; Commonwealth v. Hunt, 4 Metc. (Mass.) 111, 125; Lambert v. People, 9 Cow. (N. Y.) 578; People v. Flack, 125 N. Y. 324, 26 N. E. 267; see cases in note 13 of this section.

¹⁶ Commonwealth v. Hunt, 4 Metc. (Mass.) 111.

pretense, and by false and privy tokens, and such acts were themselves statutory crimes, it was held unnecessary to plead more specifically the means employed.¹⁷

§ 2926. Pleading—Overt acts—Surplusage.—While it is unnecessary to allege in the indictment, as a matter of pleading, that the purpose of the alleged conspiracy was accomplished, yet whether it is pleaded or not it is not necessary to prove on the trial in order to establish the conspiracy that it was in fact consummated and completed.¹⁸ Nor is it necessary, as a matter of pleading, to allege any overt acts, or to set out any actual damage to the person intended to be defrauded or injured.¹⁹ It is also a rule of pleading that if the alleged and illegal combination is imperfectly and insufficiently stated in the indictment, it will not be aided by averments of acts done in pursuance of the conspiracy.²⁰

§ 2927. Criminal conspiracy.—The term criminal conspiracy embodies its own meaning. The definitions given by courts are in the nature of illustrations or they indicate the elements entering into the offense. No better definition can be given of criminal conspiracy than that stated by some of the courts. These serve both to define and illustrate, or to state the essential elements entering into the offense. Thus, the Kentucky Court of Appeals said of it: "A criminal conspiracy is (1) a corrupt combination (2) of two or more persons, (3) by concerted action to commit (4) a criminal or an unlawful act; (a) or an act not in itself criminal or unlawful by criminal or unlawful means; (b) or an act which would tend to prejudice the public in general, to subvert justice, disturb the peace, injure public trade, affect public health, or violate public policy; (5) or any act, however innocent, by means neither criminal nor unlawful, where the tendency of the object sought would be to wrongfully coerce or oppress either the public or an individual."²¹ The definition of the Connecticut court is: "A criminal conspiracy is a combination of two or more persons to commit some crime; whether the crime to be committed is the ob-

¹⁷ *State v. Crowley*, 41 Wis. 271.

¹⁸ *Commonwealth v. O'Brien*, 12 Cush. (Mass.) 84.

¹⁹ *Commonwealth v. Fuller*, 132 Mass. 563; *State v. Straw*, 42 N. H. 393; *People v. Sheldon*, 139 N. Y. 251, 265, 34 N. E. 785.

²⁰ *Commonwealth v. Shedd*, 7 Cush.

(Mass.) 514; *Commonwealth v. Hunt*, 4 Metc. (Mass.) 111; *Commonwealth v. Wallace*, 16 Gray (Mass.) 221.

²¹ *Ætna Ins. Co. v. Commonwealth*, 106 Ky. 864, 71 S. W. 624.

ject of the conspiracy, or the means for the accomplishment of some other object, is immaterial. A combination to unlawfully inflict upon another some injury dependent for its successful accomplishment upon the force of combination, may also, in certain instances, be a criminal conspiracy, although no act to be done in its execution, or in the consummation of its object, would be a crime if done independently of the combination by any one of the conspirators."²² Or, as otherwise defined, "Criminal conspiracy is a combination or a confederation of two or more persons to commit an illegal act, or to perform a legal act by illegal means or in an illegal way. The crime is effected the moment the confederation is complete, though nothing be done pursuant to the conspiracy."²³ On this question the Supreme Court of New York say: "But to make an agreement between two or more persons, to do an act innocent in itself, a criminal conspiracy, it is not enough that it appears that the act which was the object of the agreement was prohibited. The confederation must be corrupt. The agreement must have been entered into with an evil purpose, as distinguished from a purpose simply to do the act prohibited in ignorance of the prohibition. This is implied in the meaning of the word conspiracy."²⁴ The Supreme Court of Massachusetts long ago recognized the common-law rule in regard to conspiracy, and admitted that it was in force in that commonwealth. But of this rule it said: "The general rule of the common law is that it is a criminal and indictable offense for two or more to confederate and combine together, by concerted means, to do that which is unlawful or criminal, to the injury of the public, or portions or classes of the community, or even to the rights of an individual. This rule of law may be equally in force as a rule of the common law in England and in this commonwealth; and yet it must depend upon the local laws of each country to determine whether the purpose to be accomplished by the combination, or the concerted means of accomplishing it be unlawful or criminal in the respective countries."²⁵

§ 2928. Criminal conspiracy—Maryland rule.—Maryland furnishes a very old and leading case of this country on the subject of

²² *State v. Gannon*, 75 Conn. 206, 52 Atl. 727. See also, *State v. Stockford*, (Conn.) 58 Atl. 769. ²³ *People v. Powell*, 63 N. Y. 88; *People v. Flack*, 125 N. Y. 324, 26 N. E. 267.

²⁴ *Commonwealth v. Bliss*, 12 Phila. (Pa.) 580; *State v. Straw*, 42 N. H. 393; *United States v. Lancaster*, 44 Fed. 896. ²⁵ *Commonwealth v. Hunt*, 4 Metc. (Mass.) 111.

criminal conspiracy. The points on which it was held that an indictment would lie at common law were collected and arranged in the syllabus as follows: "1. For a conspiracy to do an act not illegal, nor punishable if done by an individual, but immoral only. 2. For a conspiracy to do an act neither illegal nor immoral in an individual, but to effect a purpose which has a tendency to prejudice the public. 3. For a conspiracy to extort money from another, or to injure his reputation by means not indictable if practiced by an individual, as by verbal defamation, and that whether it be to charge him with an indictable offense or not. 4. For a conspiracy to cheat and defraud a third person, accomplished by means of an act which would not in law amount to an indictable cheat, if effected by an individual. 5. For a malicious conspiracy to impoverish or ruin a third person in his trade or profession. 6. For a conspiracy to defraud a third person by means of an act not per se unlawful, and though no person be thereby injured. 7. For a bare conspiracy to cheat or defraud a third person, though the means of effecting it should not be determined on at the time. 8. A conspiracy is a substantive offense, and punishable at common law, though nothing be done in execution of it."²⁶

§ 2929. "Unlawful"—Meaning.—The meaning of the word unlawful in the definition of conspiracy is both important and controlling. Its construction is reasonable for the suppression of crime on the one hand and with due regard for the rights of the criminal on the other. The rule generally asserted and maintained, except when changed by statute, is that it is not necessary to prove that the act for the commission of which the conspiracy or combination is formed was in itself criminal; neither is it required to show that the means used or employed in the commission of the act are in themselves criminal. In either case it is sufficient if it is made to appear that the acts or the means are in fact unlawful. Such acts and means are regarded in law as unlawful when they are shown to be in the nature of torts or wrongs for the perpetration and commission of which the law permits the recovery of exemplary damages in civil actions.²⁷ And it answers

²⁶ *State v. Buchanan*, 5 H. & J. (Mass.) 111; *Alderman v. People*, 4 (Md.) 317; *Alderman v. People*, 4 Mich. 414; *Ellzey v. State*, 57 Miss. 826; *Hart v. Hicks*, 129 Mo. 99, 31 Mich. 414, 431.

²⁷ *State v. Glidden*, 55 Conn. 46, S. W. 351; *Johnson v. State*, 26 N. 70, 8 Atl. 890; *Smith v. People*, 25 J. L. 313; *Green v. Tuchner*, 87 App. Ill. 17; *Cole v. People*, 84 Ill. 216; Div. (N. Y.) 314, 84 N. Y. S. 345; *Commonwealth v. Hunt*, 4 Metc. Cote v. Murphy, 159 Pa. 420, 28 Atl.

the test of unlawfulness where the combination is for the purpose of cheating or defrauding an individual or a private corporation, although the fraud alone may not be indictable.²⁸ And a conspiracy to cheat and defraud the public by means which common care and ordinary prudence are not sufficient to guard against, has been held to be sufficient within the meaning of the term unlawful.²⁹ As stated in an English case: "It is enough, if the acts agreed to be done, although not criminal are wrongful, i. e., amount to a civil wrong."³⁰ It is no answer to a charge of conspiracy to assume or prove that the object was lawful. It is a fundamental proposition that where it appears that the means used to effect a lawful purpose be unlawful the offense is established. The unlawfulness of the means employed in such a case must be fully shown by proper statements in the affidavit and established by proof on the trial.³¹

§ 2930. "Unlawful"—Wisconsin and New Hampshire rule.—On this question the Supreme Court of Wisconsin very aptly say: "The word 'unlawful' is not confined to criminal acts. It includes all wilful, actionable violations of civil rights. In any case the object of the combination is what gives it legal significance. If that object be to do an unlawful act in the sense of committing an actionable wrong, the means contemplated by the combination to effect such object are not material to the cause of action, whether such action be to punish the perpetrators for entering into such a combination or to recover of them the damages inflicted by carrying out its object. If the object of the conspiracy be the use of unlawful means, whether such means

190; *Payne v. Western &c. Co.*, 13 Lea (Tenn.) 507; *Callan v. Wilson*, 127 U. S. 540, 8 Sup. Ct. 1301; *United States v. Johnson*, 26 Fed. 682; *Reg. v. Parnell*, 14 Cox Cr. Cas. 508.

²⁸ See § 2933.

²⁹ *People v. Stephens*, 71 N. Y. 527; *People v. Olson*, 39 N. Y. St. 295, 15 N. Y. S. 778; *People v. Stone*, 9 Wend. (N. Y.) 188; *Lambert v. People*, 9 Cow. (N. Y.) 578; *People v. Willis*, 24 Misc. (N. Y.) 537, 54 N. Y. S. 129; *Commonwealth v. Miffin*, 5 W. & S. (Pa.) 462; *Commonwealth v. Gallagher*, 4 Pa. L. J. 58; *Crump v. Commonwealth*, 84 Va. 927, 6 S.

E. 620; *State v. Dyer*, 67 Vt. 690, 32 Atl. 814; *Dayton Mfg. Co. v. Metal Polishers &c. Union*, 8 Ohio N. P. 574, 11 Ohio Dec. 643; *Moores v. Bricklayers' Union*, 10 Ohio Dec. (Reprint) 665, 23 Cln. L. Bul. 48; *Beck v. Railway &c. Union*, 118 Mich. 497, 77 N. W. 13; *Rex v. Jones*, 4 B. & Ad. 345.

³⁰ *Reg. v. Warburton*, L. R. 1 C. C. 274.

³¹ *State v. Burnham*, 15 N. H. 396; *Rex v. Seward*, 1 Ad. & E. 706; *Rex v. Eccles*, 3 Doug. 337; 2 Russell Crimes 569. See also, *United States v. Grunberg*, 131 Fed. 137.

be the violation of the civil or criminal law, the unlawfulness of the end sought to be attained is not controlling either in a prosecution for the offense of so conspiring or an action to recover the damages suffered by the consummation of the wrongful purpose."⁸² And the Supreme Court of New Hampshire say on this subject: "When it is said in the books that the means must amount to indictable offenses, in order to make the offense of conspiracy complete, it will be enough if they are corrupt, dishonest, fraudulent, immoral, and in that sense illegal, and it is in the combination to make use of such practices that the dangers of this offense consist. Conspiracies may be indictable where neither the object, if effected, nor the means made use of to accomplish it, would be punishable without the conspiracy. In the case of a conspiracy among journeymen to raise their wages, the object of the conspiracy is lawful, and the means by which the object is to be effected are not otherwise than as the conspiracy makes them so."

§ 2931. **Public injuries.**—The rule established by the authorities in the preceding section very conclusively shows that a conspiracy is not necessarily a combination to commit a crime, or that the means to be used are in themselves criminal. Many offenses against society not in themselves criminal, become so if perpetrated by a combination of persons. There may be many offenses against society which might be considered unlawful but which the law does not punish criminally. But the test of criminality in offenses against the public must be determined largely if not solely from the influence and effect which the acts might produce upon society. This principle was stated by one court thus: "And in determining what sort of conspiracy may or may not be entered into without committing an offense punishable by the common law, regard must be had to the influence, which the act, if done, would actually have upon society, without confining the question to the inquiry whether the act might itself subject the offender to criminal punishment."⁸⁴ In an early Connecticut case it was conceded

⁸² *Martens v. Reilly*, 109 Wis. 464, 84 N. W. 840.

⁸³ *State v. Burnham*, 15 N. H. 396; *State v. Buchanan*, 5 H. & J. (Md.) 317.

⁸⁴ *Smith v. People*, 25 Ill. 17; *Ochs v. People*, 25 Ill. App. 379; *Commonwealth v. Ward*, 92 Ky. 158, 17 S. W. 283; *Commonwealth v. Manley*,

12 Pick. (Mass.) 173; *Beck v. Teamsters' &c. Union*, 118 Mich. 497, 77 N. W. 13; *State v. Burnham*, 15 N. H. 396; *State v. Straw*, 42 N. H. 393; *People v. Stephens*, 71 N. Y. 527; *Lambert v. People*, 9 Cow. (N. Y.) 578; *People v. Tweed*, 5 Hun (N. Y.) 353; *People v. Stone*, 9 Wend. (N. Y.) 188; *People v. Olson*,

"that many acts which, if done by an individual, are not indictable, are punished criminally, when done in pursuance of a conspiracy among members, is too well settled to admit of controversy."⁸⁵ In a very recent case in the same court it was said: "The combination of numbers to accomplish a wrongful act is a special danger to public morals, rights of property, and the public peace, and for this reason it is treated as an independent offense whenever it is the first step toward the commission of a crime. It is then an attempt to commit a crime, but a joint attempt to commit a crime cannot be punished as a conspiracy unless there is a combination of such a nature as to increase the danger to the public from the attempt. It is the special danger to the public from wrongful acts that are accomplished through the force of combination, which has induced the courts to treat an attempt to accomplish such acts through the force of combination as a criminal attempt, although the acts may not be criminal when committed or attempted otherwise than through a wrongful combination for that purpose."⁸⁶ Conspiracies against the public are made criminal for the purpose of affording protection to the weak as well as the strong, and to protect such persons so lacking in common care and ordinary prudence that they are unable to guard themselves against conspiracies to cheat and defraud. "The design of the law is to protect the weak and credulous from the wiles and stratagems of the artful and cun-

89 N. Y. St. 295, 15 N. Y. S. 778; *People v. Willis*, 24 Misc. (N. Y.) 537, 54 N. Y. S. 129; *State v. Trammell*, 2 Ired. L. (N. Car.) 379; *Mifflin v. Commonwealth*, 5 W. & S. (Pa.) 461; *Hazen v. Commonwealth*, 23 Pa. St. 355; *Crump v. Commonwealth*, 84 Va. 620, 6 S. E. 620; *State v. Young*, 37 N. J. L. 184; *Wood v. State*, 47 N. J. L. 461, 1 Atl. 509; *Madden v. State*, 57 N. J. L. 324, 30 Atl. 541; *Perkins v. Rogg*, 11 Ohio Dec. (Reprint) 585; *Commonwealth v. Stambaugh*, 22 Pa. Super. 386; *Clary v. Commonwealth*, 4 Pa. St. 210; *State v. DeWitt*, 2 Hill (S. Car.) 282; *State v. Cardoza*, 11 S. Car. 195; *State v. Dyer*, 67 Vt. 690, 32 Atl. 814; *Rex v. De Berenger*, 3 M. & S. 57; *Rex v. Roberts*, 1 Campb. 399; *Rex v. Turner*, 13 East

228; *Rex v. Mott*, 2 Car. & P. 521, 12 E. C. L. 244; *Reg. v. Gompartz*, 9 Q. B. 824, 58 E. C. L. 824; *Rég. v. Esdalle*, 1 F. & F. 213; *Reg. v. Brown*, 7 Cox Cr. Cas. 442; *Reg. v. Gurney*, 11 Cox Cr. Cas. 414; *Reg. v. Warburton*, 11 Cox Cr. Cas. 584.

⁸⁵ *State v. Rowley*, 12 Conn. 101.

⁸⁶ *State v. Gannon*, 75 Conn. 206, 52 Atl. 727; *State v. Donaldson*, 32 N. J. L. 151; *State v. Young*, 37 N. J. L. 184; *State v. Cole*, 39 N. J. L. 324; *State v. Hickling*, 41 N. J. L. 208; *Noyes v. State*, 41 N. J. L. 418; *Johnson v. State*, 26 N. J. L. 313; *State v. De Witt*, 2 Hill (S. Car.) 282; *State v. Shooter*, 8 Rich. (S. Car.) 72; *State v. Buchanan*, 5 H. & J. (Md.) 317; *State v. Burnham*, 15 N. H. 396; *State v. Parker*, 43 N. H. 88.

ning, as well as those whose vigilance and sagacity enable them to protect themselves."³⁷ This rule of the policy of the law to protect the public has been carried to the extent of holding that it is sufficient to state in the indictment that the purpose of the conspiracy was to cheat and defraud divers citizens of a particular locality or the public generally.³⁸ On the same subject the Massachusetts court say: "It is said to be sufficient if the end proposed, or means to be employed, are by reason of the power of the combination, particularly dangerous to the public interests, or particularly injurious to some individual, although not criminal."³⁹

2932. Public injuries—New Hampshire rule.—The Supreme Court of New Hampshire has given expression in favor of protecting against conspiracies to injure the public as follows: "Combinations against law or against individuals are always dangerous to the public peace and to public security. To guard against the union of individuals to effect an unlawful design, is not easy, and to detect and punish them is often extremely difficult. The unlawful confederacy is, therefore, punished to prevent any act in execution of it. This principle is the foundation of the adjudged cases upon this subject. But the law by no means intends to exclude society from the benefits of united effort for legitimate purposes, and such as promote the well being of individuals or of the public. It uses the word conspiracy in its bad sense. An act may be immoral without being indictable where the isolated acts of an individual are not so injurious to society as to require the intervention of the law. But when immoral acts are committed by numbers, in furtherance of a common object, and with the advantages and strength which determination and union impart to them, they assume the grave importance of a conspiracy, and the peace and order of society require their repression."⁴⁰

³⁷ *McKee v. State*, 111 Ind. 378, 12 N. E. 510; *Miller v. State*, 79 Ind. 198; *Smith v. State*, 17 Am. L. Reg. 525, 16 Am. L. Reg. 321-325; 2 Wharton Cr. Law, §§ 1186, 1187, 1188; 2 Bishop Cr. Law, §§ 433, 434.

³⁸ *McKee v. State*, 111 Ind. 378, 12 N. E. 510; *People v. Arnold*, 46 Mich. 268, 9 N. W. 406; *Collins v. Commonwealth*, 3 S. & R. (Pa.) 220;

Clary v. Commonwealth, 4 Pa. St. 210; *Commonwealth v. Judd*, 2 Mass. 329; *Reg. v. Peck*, 9 Ad. & El. 686; *Rex v. De Berenger*, 3 M. & S. 67; 2 Bishop Cr. Law, § 209; 2 Wharton Cr. Law, § 1396.

³⁹ *Commonwealth v. Waterman*, 122 Mass. 43.

⁴⁰ *State v. Burnham*, 15 N. H. 896.

§ 2933. **Private injuries.**—Some courts have carried the doctrine of indictable conspiracy to the extent of holding that it is sufficient to establish a conspiracy to show a combination to defraud an individual or a corporation. There is apparently no good reason for the rule that the conspiracy or combination should be so formidable as to be a menace to the public. Of this the New Jersey court say: "The great weight of authority, the adjudged cases, no less than the most approved elementary writers, sustain the position that a conspiracy to defraud individuals or a corporation of their property, may, in itself constitute an indictable offense, though the act done, or proposed to be done, in pursuance of the conspiracy, be not, in itself, indictable."⁴¹ And it was said by the Supreme Court of North Carolina in an early case that "it has long been established that every conspiracy to injure individuals or to do acts which are unlawful, or prejudicial to the community, is a conspiracy and indictable."⁴² On the question of whether or not the combination to injure a private person is lawful or unlawful, it was held to be determined by whether or not the means by which the object was to be accomplished are lawful or unlawful.⁴³

§ 2934. **Order of proof.**—The rule that some proof of a conspiracy is necessary in order to justify the admission of acts and declarations of one of the co-conspirators does not necessarily control the order of proof. As previously seen, the admissibility of such evidence is largely within the discretion of the trial court, and he determines when the sufficient prima facie case has been made. For like reasons he may also control the order of proof. It has been held that the state may prove such acts and declarations of one of the conspirators done and made in the absence of the other, before any proof of the conspiracy is offered.⁴⁴ The trial court will frequently admit evi-

⁴¹ State v. Norton, 23 N. J. L. 33; State v. Donaldson, 32 N. J. L. 151; State v. Burnham, 15 N. H. 396; Clinton v. Estes, 20 Ark. 216; Lambert v. People, 9 Cow. (N. Y.) 578; State v. Huegin, 110 Wis. 189, 85 N. W. 1046; Alderman v. People, 4 Mich. 414; State v. Stewart, 59 Vt. 273, 9 Atl. 559; State v. Dyer, 67 Vt. 690, 32 Atl. 814; Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1301.

⁴² State v. Young, 12 N. Car. 257.

⁴³ Commonwealth v. Hunt, 4 Metc. (Mass.) 111.

⁴⁴ People v. Brotherton, 47 Cal. 388; 2 Green Crimes 444; People v. Daniels, 105 Cal. 262, 38 Pac. 720; State v. Thompson, 69 Conn. 720, 38 Atl. 868; State v. Mushrush, 97 Iowa 444, 66 N. W. 746; Miller v. Dayton, 57 Iowa 423, 10 N. W. 814; State v. Winner, 17 Kans. 298; State v. Rogers, 54 Kans. 683, 39 Pac. 219; People v. Saunders, 25 Mich. 119; State

dence of the acts and declarations of one of the conspirators before any proof of the conspiracy is offered, on the statement of counsel that sufficient or satisfactory evidence on the subject of the conspiracy will thereafter be introduced.⁴⁵

§ 2935. Two or more engaged.—The term conspiracy implies a combination of two or more persons, and the rule is that to authorize a conviction for conspiracy the proof must show that more than one person was engaged. Where one conspirator only is on trial the proof must show that some other person was also guilty.⁴⁶ The rule as to pleading has been stated thus: "An indictment for conspiracy cannot charge the offense against one only, for the very nature and essence of the crime exclude the idea of its commission by a single individual. But the indictment may allege that the defendant, together with other persons, committed the offense."⁴⁷ Where more than two persons are charged as conspirators it has been held sufficient if the proof show that two of them were guilty, and that the charge as to the others was surplusage. It was held not essential that the proof show that all were guilty.⁴⁸ But in prosecutions for conspiracy

v. Ross, 29 Mo. 32; *State v. Daubert*, 42 Mo. 239; *State v. Walker*, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133; *State v. Melrose*, 98 Mo. 594, 12 S. W. 250; *State v. Flanders*, 118 Mo. 227, 23 S. W. 1086; *Hart v. Hicks*, 129 Mo. 99, 31 S. W. 351; *Lamar v. State*, 63 Miss. 265; *State v. Faulkner*, 175 Mo. 546, 591, 75 S. W. 116; *State v. Kennedy*, 177 Mo. 98, 75 S. W. 979; *State v. Nell*, 79 Mo. App. 243; *Place v. Minster*, 65 N. Y. 89; *State v. Jackson*, 82 N. Car. 565; *State v. Anderson*, 92 N. Car. 732; *Avery v. State*, 10 Tex. App. 199, 211; 1 *Greenleaf Ev.*, § 111; 3 *Greenleaf Ev.*, § 92; 3 *Rice Ev.*, § 581; 2 *Wharton Cr. Law* (8th ed.), § 401; *Underhill Cr. Ev.*, § 494.

⁴⁵ *State v. Faulkner*, 175 Mo. 546, 591, 75 S. W. 116; *State v. Grant*, 86 Iowa 216, 53 N. W. 120; *Work v. McCoy*, 87 Iowa 217, 54 N. W. 140; *Place v. Minster*, 65 N. Y. 89; *Owens v. State*, 16 Lea (Tenn.) 1; *Armstead v. State*, 22 Tex. App. 51, 2 S.

W. 627; *Hall v. State*, 31 Fla. 176, 12 So. 449.

⁴⁶ *Evans v. People*, 90 Ill. 384; *Carl Corper & Co. v. Minwegen & Co.*, 77 Ill. App. 213; *State v. Christianbury*, 44 N. Car. 46; *People v. Richards*, 67 Cal. 412, 7 Pac. 828; *State v. O'Donald*, 1 McCord (S. Car.) 532; *State v. Egan*, 10 La. Ann. 698; *People v. Olcott*, 2 Johns. Cas. (N. Y.) 301; *Gaunce v. Backhouse*, 37 Pa. St. 350; *Commonwealth v. Irwin*, 8 Phila. (Pa.) 380; *Commonwealth v. Manson*, 2 Ashm. (Pa.) 31; *State v. Jackson*, 7 Rich. (S. Car.) 283; *United States v. Dunbar*, 27 C. C. A. 488, 83 Fed. 151; *United States v. Hirsch*, 100 U. S. 33; *United States v. Cassidy*, 67 Fed. 698; 2 *Wharton Cr. Law*, §§ 755, 2339; 2 *Russell Crimes* 674.

⁴⁷ 1 *Bishop Cr. Proc.*, §§ 225, 464; 2 *Wharton Cr. Law*, § 1388; *People v. Richards*, 67 Cal. 412, 7 Pac. 828.

⁴⁸ *Woodworth v. State*, 20 Tex. App. 375

any one of the conspirators may be proceeded against alone, and may be tried and convicted; the fact that other conspirators are named in the indictment does not render it bad.⁴⁹ So one person may be indicted for a conspiracy with other persons to the grand jurors unknown.⁵⁰ For these reasons it has been held that a husband and wife, being regarded as one person by the common law, could not be indicted and prosecuted for a criminal conspiracy between them alone. And it seems that this rule has not been changed by statute.⁵¹

§ 2936. Proof of conspiracy.—No precise rule can be given either as to the nature or degree of proof sufficient to establish the fact of a conspiracy. The law recognizes the difficulty in making direct and positive proof of the unlawful agreement, and hence does not require the strictest possible proof of the fact of the conspiracy. It is usually established by proof of such facts and circumstances from which the unlawful combination may be inferred. Mr. Greenleaf states the rule as follows: "If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same so as to complete it, with a view to the attainment of the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object."⁵² The rule is stated by Mr. Wharton thus: "The actual fact of conspiring may be inferred, as has been said, from circumstances, and the concurring conduct of the defendants need not be directly proved. Any joint action on a material point, or a collection of independent but co-operative acts, by persons closely associated with each other, is held to be sufficient to enable

⁴⁹ *People v. Richards*, 67 Cal. 412, 7 Pac. 828; 2 Bishop Cr. Proc., § 225.

⁵⁰ 2 Wharton Cr. L., § 1388.

⁵¹ *People v. Miller*, 82 Cal. 107, 22 Pac. 934; *People v. Richards*, 67 Cal. 412, 7 Pac. 828; *State v. Clark*, 9 Houst. (Del.) 536, 33 Atl. 310; *State v. Christianbury*, 44 N. Car. 46

⁵² 3 Greenleaf Ev., § 93; *People v. Bentley*, 75 Cal. 407, 17 Pac. 436; *State v. Thompson*, 69 Conn. 720, 38 Atl. 868; *Ochs v. People*, 124 Ill. 399, 16 N. E. 662; *Redding v. Godwin*, 44 Minn. 355, 46 N. W. 563;

Archer v. State, 106 Ind. 426, 7 N. E. 225; *Tucker v. Hyatt*, 151 Ind. 332, 51 N. E. 469; *State v. Walker*, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133; *Hart v. Hicks*, 129 Mo. 99, 31 S. W. 351; *State v. Kennedy*, 177 Mo. 98, 75 S. W. 979; *State v. Rogers*, 54 Kans. 683, 39 Pac. 219; *United States v. Cole*, 5 McLean (U. S.) 513, 601; *Reg. v. Brittain*, 3 Cox Cr. Cas. 76; 2 Bishop Cr. Proc., § 227; 2 Wharton Cr. Law, §§ 1398, 1401; Wharton Cr. Ev., § 698; 1 Taylor Ev. (Pt. 2), § 591; see § 2937.

the jury to infer concurrence of sentiment.”⁵³ The rule has been very fairly stated by the Supreme Court of California as follows: “A conspiracy, like most other facts, may be proved by circumstantial evidence. Indeed, it is not often that the direct facts of a common design, which is the essence of a conspiracy, can be proven otherwise than by the establishment of independent facts, bearing more or less remotely upon the main central object, and tending to convince the mind reasonably and logically of the existence of the conspiracy.”⁵⁴

§ 2937. Proof of conspiracy—Sufficiency.—To establish the offense there must be proof of an unlawful combination; but this may be established by proof of concerted action which is in itself unlawful. It is not sufficient to establish the guilt of one of the conspirators to prove that he was merely present at the execution or consummation of the conspiracy; but some word or act must be shown to have been said or done in furtherance of the conspiracy. It is sufficient, however, to show that the accused either incited, procured or encouraged the act.⁵⁵ Nor is it necessary to show that the accused entered into the arrangement at the inception of the conspiracy; it is sufficient if the proof shows that he joined it at any time after its formation; if he joins it at any time he thereby becomes a conspirator and adopts the acts of his associates.⁵⁶

⁵³ 2 Wharton Cr. Law (9th ed.), § 1398.

⁵⁴ *People v. Bentley*, 75 Cal. 407, 17 Pac. 436.

⁵⁵ *Martin v. State*, 89 Ala. 115, 8 So. 23; *Gibson v. State*, 89 Ala. 121, 8 So. 98; *Crittenden v. State*, 134 Ala. 145, 32 So. 273; *Wright v. State*, 42 Ark. 94; *People v. Woodward*, 45 Cal. 293; *Evans v. People*, 90 Ill. 384; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898; *Clem v. State*, 33 Ind. 418; *State v. King*, 104 Iowa 727, 74 N. W. 691; *Thompson v. Commonwealth*, 1 Metc. (Ky.) 13; *Butler v. Commonwealth*, 2 Duv. (Ky.) 435; *State v. Ripley*, 31 Me. 386; *State v. Cox*, 65 Mo. 29; *Kelley v. People*, 55 N. Y. 565; *Brannock v. Bouldin*, 4 Ired. L. (N. Car.) 61;

Hauser v. Tate, 85 N. Car. 81; *State v. Anderson*, 92 N. Car. 732; *Commonwealth v. Bartilson*, 85 Pa. St. 482; *Raleigh &c. Bros. v. Cook*, 60 Tex. 438; *Blain v. State*, 33 Tex. Cr. App. 236, 26 S. W. 63; *Connaughty v. State*, 1 Wis. 159; *Holtz v. State*, 76 Wis. 100, 44 N. W. 1107; 1 Wharton Cr. Law, §§ 211b, 227; 2 Wharton Cr. Law, § 1402.

⁵⁶ *United States v. Johnson*, 26 Fed. 682; *United States v. Cassidy*, 67 Fed. 698; *United States v. Babcock*, 3 Dill. (U. S.) 586; *Stewart v. State*, 26 Ala. 44; *State v. Clark*, 9 Houst. (Del.) 536, 33 Atl. 310; *Ochs v. People*, 124 Ill. 399, 16 N. E. 662; *McKee v. State*, 111 Ind. 378, 12 N. E. 510; *State v. Crab*, 121 Mo. 554, 26 S. W. 548; *Den v. Johnson*, 18

§ 2938. Proof of formal agreement not necessary.—The rule requiring proof to establish the existence of a conspiracy is a reasonable one for the guidance of practical men in the administration of justice. That the conspiracy must be established by proof is uniformly conceded by the adjudicated cases. But the method of establishing it is not the subject of a general rule. The law does not require the actual proof of a formal agreement nor does it require proof of the conspiracy by direct or positive evidence. The very nature of the crime is such as to render difficult and often unpracticable proof of a formal agreement or to establish the conspiracy by direct evidence. The law does not require the prosecution to prove that the alleged conspirators came together and actually agreed in terms to a common design and to pursue it by common means. The common intent or the joint assent of minds may be inferred from facts and circumstances, and the offense may be established by proof that the conspirators, by their acts, pursued the same object, using the same or different means, each performing some part and all working toward the accomplishment of the same object. Such proof is held sufficient to justify the inference that the parties so acting were engaged in the alleged conspiracy.⁵⁷ The conspiracy, or the agreement which constitutes the alleged conspiracy, is not required to be established by direct and positive evidence; this fact, like others

N. J. L. 87; *Owens v. State*, 16 Lea (Tenn.) 1; *Smith v. State*, (Tex.) 17 S. W. 560; *Stevens v. State*, (Tex.) 59 S. W. 545; *Hudson v. State*, (Tex.) 66 S. W. 668; *Sands v. Commonwealth*, 21 Gratt. (Va.) 871; *Holtz v. State*, 76 Wis. 100, 44 N. W. 1107.

⁵⁷ *Williams v. State*, 81 Ala. 1, 1 So. 179; *Gibson v. State*, 89 Ala. 121, 8 So. 98; *Tanner v. State*, 92 Ala. 1, 9 So. 613; *Pierson v. State*, 99 Ala. 148, 13 So. 550; *Collins v. State*, 138 Ala. 57, 34 So. 993; *State v. Thompson*, 69 Conn. 720, 38 Atl. 868; *State v. Gannon*, 75 Conn. 206, 52 Atl. 727; *Evans v. People*, 90 Ill. 384; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898; *Ochs v. People*, 124 Ill. 399, 16 N. E. 662; *O'Donnell v. People*, 41 Ill. App. 23; *Archer v.*

State, 106 Ind. 426, 7 N. E. 225; *McKee v. State*, 111 Ind. 378, 12 N. E. 510; *Tucker v. Hyatt*, 151 Ind. 332, 51 N. E. 469; *State v. King*, 104 Iowa 727, 74 N. W. 691; *Commonwealth v. Eastman*, 1 Cush. (Mass.) 189; *People v. Flack*, 125 N. Y. 324, 26 N. E. 267; *People v. Saunders*, 25 Mich. 119; *Beebe v. Knapp*, 28 Mich. 53; *People v. Butler*, 111 Mich. 483, 69 N. W. 734; *United States v. Rindskopf*, 6 Biss. (U. S.) 259; *United States v. Nunnemacher*, 7 Biss. (U. S.) 111; *United States v. Doyle*, 6 Sawy. (U. S.) 612; *United States v. Sacia*, 2 Fed. 754; *United States v. Frisbie*, 28 Fed. 808; *United States v. Cassidy*, 67 Fed. 698; *Drake v. Stewart*, 22 C. C. A. 104, 76 Fed. 140. See also, *State v. Stockford*, (Conn.) 58 Atl. 769.

in criminal procedure, may be inferred. This rule has been stated thus: "The joint assent of the minds of the parties to a conspiracy may be found by the jury, like any other ultimate fact, as an inference from other facts."⁵⁸ The prosecution is not required to prove that all the conspirators were present and participated either at the inception or at the consummation of the conspiracy.⁵⁹ Where the proof shows an unlawful combination, or a combination to do an unlawful thing, and in the prosecution of the common design by one or more of the alleged conspirators a criminal result is accomplished, though different from the particular result intended, all are guilty.⁶⁰

§ 2939. Declarations of co-conspirator—Admissibility as evidence.

It is perhaps the universal rule that any act done, or any declaration made, by any one of the conspirators in the furtherance or perpetrations of the alleged conspiracy may be given in evidence against himself or his co-conspirators. This rule has been more aptly stated as follows: "The law undoubtedly is, that where two or more persons combine or associate together for the prosecution of some fraudulent or illegal purpose, any act or declaration made by one of them in furtherance of the common object, and forming a part of the *res gestae*, may be given in evidence against the other."⁶¹ Of this rule

⁵⁸ *Drake v. Stewart*, 22 C. C. A. 104, 76 Fed. 140; *Glaspie v. Keator*, 5 C. C. A. 474, 56 Fed. 203; *Archer v. State*, 106 Ind. 426, 7 N. E. 225; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898.

⁵⁹ *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898; see § 2937, for additional authorities.

⁶⁰ *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898; *Williams v. State*, 81 Ala. 1, 1 So. 179; *Gibson v. State*, 89 Ala. 121, 8 So. 98; *Jolly v. State*, 94 Ala. 19, 10 So. 606; *Evans v. State*, 109 Ala. 11, 19 So. 535; *Bridges v. State*, 110 Ala. 15, 20 So. 348; *People v. Holmes*, 118 Cal. 444, 50 Pac. 675.

⁶¹ *Phoenix Ins. Co. v. Moog*, 78 Ala. 284; *Collins v. State*, 138 Ala. 57, 34 So. 993; *Smith v. State*, 133 Ala. 73, 31 So. 942; *People v. Geiger*, 49 Cal.

643; *People v. Bentley*, 75 Cal. 407, 17 Pac. 646; *People v. Bentley*, 77 Cal. 7, 18 Pac. 799; *People v. Irwin*, 77 Cal. 404, 20 Pac. 56; *People v. Dixon*, 94 Cal. 255, 29 Pac. 504; *State v. Thompson*, 69 Conn. 720, 38 Atl. 868; *Wilson v. People*, 94 Ill. 299; *Wolfe v. Pugh*, 101 Ind. 293; *Card v. State*, 109 Ind. 415, 9 N. E. 591; *Moore v. Shields*, 121 Ind. 267, 23 N. E. 89; *State v. Westfall*, 49 Iowa 328; *Johnson v. Miller*, 63 Iowa 529, 17 N. W. 34; *State v. McGee*, 81 Iowa 17, 46 N. W. 764; *State v. Johnson*, 40 Kans. 266, 19 Pac. 749; *People v. Pitcher*, 15 Mich. 397; *People v. Parker*, 67 Mich. 222, 34 N. W. 720; *State v. Faulkner*, 175 Mo. 546, 591, 75 S. W. 116; *State v. George*, 7 Ired. L. (N. Car.) 321; *Waterbury v. Sturtevant*, 18 Wend. (N. Y.) 353; *Jones v. Hurlburt*, 39 Barb. (N.

the Supreme Court of Indiana said: "The principle on which the acts and declarations of other conspirators, and acts done at different times, are admitted in evidence against the persons prosecuted is, that, by the act of conspiring together, the conspirators have jointly assumed to themselves, as a body, the attribute of individuality, so far as regards the prosecution of the common design, thus rendering whatever is done or said by any one, in furtherance of that design, a part of the *res gestæ*, and, therefore, the act of all."⁶² Substantially the same rule applies in criminal as in civil cases as to the admissibility of the acts or declarations of one conspirator as original evidence against each member of the conspiracy.⁶³

§ 2940. Declarations of co-conspirator—Preliminary proof.—Certain preliminary proof is required before proof of the acts or declarations of an alleged co-conspirator can be given in evidence. Before these are admissible some proof from other sources must be given for the purpose of establishing or tending to establish the alleged conspiracy. The conspiracy itself cannot be established by proof of the mere acts and declarations of one of the conspirators. The rule on this subject has been stated thus: "To authorize such declarations to be received, however, so as to effect co-conspirators, it is clear that certain proof must first be made aliunde, in establishment of the conspiracy itself. Nothing is more certain than the proposition that the conspiracy cannot be proved merely by the declarations. The rule is precisely analogous to that governing the admissions and declarations of agents when offered in evidence against the principal."⁶⁴

Y.) 403; *Patton v. State*, 6 Ohio St. 467; *Fouts v. State*, 7 Ohio St. 471; *Preston v. Bowers*, 13 Ohio St. 1; *Clawson v. State*, 14 Ohio St. 234; *Rufer v. State*, 25 Ohio St. 464; *Hunter's Case*, 7 Gratt. (Va.) 641; *Heine v. Commonwealth*, 91 Pa. St. 145; *Owens v. State*, 16 Lea (Tenn.) 1; *Myers v. State*, 6 Tex. App. 1; 3 *Greenleaf Ev.*, § 94.

⁶² *Ford v. State*, 112 Ind. 373, 14 N. E. 241; *Moore v. Shields*, 121 Ind. 267, 23 N. E. 89; *State v. Thaden*, 43 Minn. 253, 45 N. W. 447; *Clinton v. Estes*, 20 Ark. 216; *Jen-*

kins v. State, 35 Fla. 737, 821, 18 So. 182; *Owens v. State*, 16 Lea (Tenn.) 1; *Cortez v. State*, 24 Tex. App. 511, 6 S. W. 546; *Armstead v. State*, 22 Tex. App. 51, 2 S. W. 627.

⁶³ *Card v. State*, 109 Ind. 415, 9 N. E. 591.

⁶⁴ *Phoenix Ins. Co. v. Moog*, 78 Ala. 284; *People v. Geiger*, 49 Cal. 643; *Wolfe v. Pugh*, 101 Ind. 293; *Smith v. Freeman*, 71 Ind. 85; *Johnson v. Miller*, 63 Iowa 529, 17 N. E. 34; *Burke v. Miller*, 7 Cush. (Mass.) 547; *Exchange Bank v. Russell*, 50 Mo. 531; *State v. Walker*, 98 Mo. 95,

§ 2941. Declarations of co-conspirator—Prima facie case.—The rule requiring some proof of a conspiracy in order to render the acts and declarations of a co-conspirator admissible is reasonable; and while its purpose is to protect the accused against the admissibility of improper proofs, yet it is not intended to operate to the prejudice of the due administration of justice. The rule is not carried to the extent of holding that the conspiracy must be established beyond a reasonable doubt, or even to the satisfaction of the jury. The rule requires no more than proof sufficient to establish, in the opinion of the trial judge, a prima facie case on the proposition of the existence of the conspiracy. And when in the sound discretion of the trial judge he is satisfied that a sufficient prima facie case of the conspiracy has been made, he then admits the evidence of the acts and declarations of any one of the co-conspirators against the other. This rule has been thus stated: "If the evidence already offered aliunde in proof of the conspiracy, or tending to prove it, is sufficient, in the opinion of the presiding judge, to authorize the jury to find in favor of the fact of its existence, this makes out a prima facie case and lets in the declarations made by any co-conspirator during the pendency of the enterprise and in furtherance of its objects."⁶⁵ This prima facie case is not required to be established by positive or direct evidence,

9 S. W. 646; *Hart v. Hopson*, 52 Mo. App. 177; *Ormsby v. People*, 53 N. Y. 472; *Helser v. McGrath*, 58 Pa. St. 458.

⁶⁵ *Phoenix Ins. Co. v. Moog*, 78 Ala. 284; *McAnally v. State*, 74 Ala. 9; *Williams v. State*, 81 Ala. 1, 1 So. 179; *Hunter v. State*, 112 Ala. 77, 21 So. 65; *Smith v. State*, 133 Ala. 73, 31 So. 942; *Collins v. State*, 138 Ala. 57, 34 So. 993; *People v. Kelly*, 133 Cal. 1, 64 Pac. 1091; *State v. Thompson*, 69 Conn. 720, 38 Atl. 868; *Foster v. Thrasher*, 45 Ga. 517; *Card v. State*, 109 Ind. 415, 9 N. E. 591; *Roberts v. Kendall*, 3 Ind. App. 339, 29 N. E. 487; *State v. McGee*, 81 Iowa 17, 46 N. W. 764; *State v. Row*, 81 Iowa 138, 46 N. W. 872; *People v. Parker*, 67 Mich. 222, 34 N. W. 720; *Browning v. State*, 30 Miss. 656; *State v. Walker*, 98 Mo. 95, 9 S. W.

646; *State v. Flanders*, 118 Mo. 227, 23 S. W. 1086; *State v. Kennedy*, 177 Mo. 98, 75 S. W. 979; *Ormsley v. People*, 53 N. Y. 472; *Jones v. Hurlburt*, 39 Barb. (N. Y.) 403; *Carpenter v. Sheldon*, 5 Sandf. (N. Y.) 77; *State v. George*, 7 Ired. L. (N. Car.) 321; *Clawson v. State*, 14 Ohio St. 234; *Limerick v. State*, 14 Ohio C. C. 207; *Goins v. State*, 46 Ohio St. 457, 21 N. E. 476; *State v. Roach*, 35 Ore. 224, 57 Pac. 1016; *Pacific & Co. v. Gentry*, 38 Ore. 275, 61 Pac. 422; *State v. Moore*, 32 Ore. 65, 48 Pac. 468; *Roberts v. Briscoe*, 1 Ohio C. C. 577; *Ditzler v. State*, 4 Ohio C. 551; *Owens v. State*, 16 Lea (Tenn.) 1; *Myers v. State*, 6 Tex. App. 1; *Baker v. State*, 80 Wis. 416, 50 N. W. 518; 1 *Greenleaf Ev.*, § 111; 1 *Wharton Cr. Ev.*, § 1205; *State v. Stockford*, (Conn.) 58 Atl. 769.

but may be made to appear by proof of circumstances from which it may be inferred.⁶⁶ And the rule in some jurisdictions is that where there is any evidence at all supporting the decision of conspiracy the judgment will not be reversed.⁶⁷

§ 2942. Prima facie case—Sufficiency.—No definite rule can be given as to what will constitute a sufficient prima facie case in order to render admissible the acts and declarations of a co-conspirator. While the admissibility of such evidence is for the trial court, its decision on this question is subject to review, and an appellate court will reverse the judgment where it appears that such proof was admitted when a prima facie case had not been established. The illustrative cases to this point are safer to follow than any general rule that can be deduced and stated.⁶⁸

§ 2943. Declarations of co-conspirators—Limitations to rule.—The rule as to the admission of acts and declarations of a co-conspirator must not be misunderstood, and must not be extended beyond its legitimate limits. The authorities go to the proposition that the acts or statements competent to be proved must have been done or made in the prosecution of the criminal conspiracy, or in the furtherance

⁶⁶ *Hunter v. State*, 112 Ala. 77, 21 So. 65.

⁶⁷ *Hunsinger v. Hofer*, 110 Ind. 390, 11 N. E. 463; *Doherty v. Holli-day*, 137 Ind. 282, 295, 32 N. E. 315.

⁶⁸ (1) Proof held sufficient to establish prima facie case: *Hunter v. State*, 112 Ala. 77, 21 So. 65; *McAnally v. State*, 74 Ala. 9; *People v. Geiger*, 49 Cal. 643; *People v. Dixon*, 94 Cal. 255, 29 Pac. 504; *State v. Thompson*, 69 Conn. 720, 38 Atl. 868; *Smith v. Freeman*, 71 Ind. 85; *Card v. State*, 109 Ind. 415, 9 N. E. 591; *Tucker v. Hyatt*, 151 Ind. 332, 51 N. E. 469; *State v. Row*, 81 Iowa 138, 46 N. W. 872; *McMannus v. Lee*, 43 Mo. 206; *State v. Walker*, 28 Mo. 95, 9 S. W. 646, 11 S. W. 1133; *State v. Kennedy*, 177 Mo. 98, 75 S. W. 979; *People v. Parker*, 67 Mich. 222, 34 N. W. 720; *Scott v. State*, 30 Ala. 403; (2) Proof held

insufficient to establish prima facie case: *People v. Stevens*, 68 Cal. 113, 8 Pac. 712; *People v. Kelly*, 133 Cal. 1, 64 Pac. 1091; *Foster v. Thrasher*, 45 Ga. 517; *Belcher v. State*, 125 Ind. 419, 25 N. E. 545; *Henrich v. Saier*, 124 Mich. 86, 82 N. W. 879; *Hart v. Hicks*, 129 Mo. 99, 31 S. W. 351; *Hart v. Hopson*, 52 Mo. App. 177; *State v. Weaver*, 165 Mo. 1, 65 S. W. 308; *Strange v. Commonwealth*, 23 Ky. L. R. 1234, 64 S. W. 980; *People v. Bennett*, 49 N. Y. 137; *Ormsby v. People*, 53 N. Y. 472; *Carpenter v. Sheldon*, 5 Sandf. (N. Y.) 77; *State v. Roach*, 35 Ore. 224, 57 Pac. 1016; *Girdner v. Walker*, 1 Heisk. (Tenn.) 186; *Martin Brown Co. v. Perrill*, 77 Tex. 199, 13 S. W. 975; *Young v. State*, (Tex. Cr. App.) 69 S. W. 153; *People v. Radt*, 71 N. Y. S. 846; 1 *Greenleaf Ev.*, § 111; *Wharton Cr. Ev.*, § 698.

of the object or common design of the conspiracy.⁶⁹ So it has been held that the admissibility of the acts and declarations of a conspirator are proper only when they are either in themselves acts or accompany and explain acts for which the others are responsible; but that they are not admissible when in the nature of narratives, descriptions or subsequent confessions.⁷⁰

§ 2944. Declarations made after conspiracy terminated—Rule and exceptions.—There is another limitation on the rule admitting the declarations of a co-conspirator as evidence. This limitation is to the effect that declarations made by one of the conspirators after the conspiracy has been effected and the crime perpetrated, or the object of the conspiracy defeated, are not admissible in evidence against any except the person making them.⁷¹ But the rule that declarations of a conspirator made after the conspiracy is terminated are not admissible is subject to some exceptions. These exceptions embrace the cases where the property obtained as a result of the con-

⁶⁹ Hunter v. State, 112 Ala. 77, 21 So. 65; People v. Stanley, 47 Cal. 113; State v. Glidden, 55 Conn. 46, 8 Atl. 890; Spies v. People, 122 Ill. 1, 12 N. E. 865; Card v. State, 109 Ind. 415, 9 N. E. 591; State v. McGee, 81 Iowa 17, 46 N. W. 764; People v. Kerr, 6 N. Y. Cr. 406, 6 N. Y. S. 674; State v. Row, 81 Iowa 138, 46 N. W. 872; Goins v. State, 46 Ohio 457, 21 N. E. 476; State v. Johnson, 40 Kans. 266, 19 Pac. 749; Wilson v. People, 94 Ill. 299; State v. Arnold, 48 Iowa 566; State v. Westfall, 49 Iowa 328; Patton v. State, 6 Ohio St. 467; Clawson v. State, 14 Ohio St. 234; Fouts v. State, 7 Ohio St. 471; Griffin v. State, 14 Ohio St. 55; Rufer v. State, 25 Ohio St. 464; Sharpe v. State, 29 Ohio St. 263; Searles v. State, 6 Ohio C. C. 381.

⁷⁰ State v. Ross, 29 Mo. 32; State v. Cooper, 85 Mo. 256; State v. Melrose, 98 Mo. 594, 2 S. W. 250; Spies v. People, 122 Ill. 1, 12 N. E. 865; Powers v. Commonwealth, 22 Ky. L. R. 1807, 61 S. W. 735; State v. Lark-

in, 49 N. H. 39; Clawson v. State, 14 Ohio St. 239; Rufer v. State, 25 Ohio St. 464; State v. Newport, 4 Har. (Del.) 567; State v. Thibau, 30 Vt. 100; Dilcher v. State, 42 Ohio St. 173.

⁷¹ People v. Irwin, 77 Cal. 494, 20 Pac. 56; People v. Stanley, 47 Cal. 113, 118; People v. Aleck, 61 Cal. 138; Spies v. People, 122 Ill. 1, 12 N. E. 865; Samples v. People, 121 Ill. 547; Moore v. Shields, 121 Ind. 267, 23 N. E. 89; State v. Ross, 29 Mo. 32; State v. Melrose, 98 Mo. 594, 12 S. W. 250; State v. Johnson, 40 Kans. 266, 19 Pac. 749; Blue v. Peter, 40 Kans. 701, 20 Pac. 442; State v. Rogers, 54 Kans. 683, 39 Pac. 219; State v. Buchanan, 35 La. Ann. 89; Patton v. State, 6 Ohio St. 467; State v. Tice, 30 Ore. 457, 48 Pac. 367; State v. Magone, 32 Ore. 206, 51 Pac. 452; State v. Hinkle, 33 Ore. 33, 54 Pac. 155; Pacific & Co. v. Gentry, 38 Ore. 275, 61 Pac. 422; Helser v. McGrath, 58 Pa. St. 458; 3 Greenleaf Ev., §§ 111, 233.

spiracy remained to be disposed of to the common interest of all, or where such declarations were made with reference to a subsisting interest in the property acquired pursuant to the conspiracy.⁷²

§ 2945. Proof when co-conspirators are not named.—The question has arisen as to the admissibility of the acts and declarations of one of the conspirators where the indictment failed to allege a conspiracy, or failed to set out the names of the co-conspirators. On this question the authorities are not uniform. The weight of authority is in favor of their admissibility, but the better reasoning is certainly with the cases holding against it. The rule in favor of the admissibility is thus stated by Mr. Wharton: "It makes no difference as to the admissibility of the act or declarations of a conspirator against a defendant, whether the former be indicted or not, or tried or not, with the latter; for the making one a co-defendant does not make his acts or declarations any more evidence against another than they were before; the principle upon which they are admissible at all being that the act or declaration of one is the act or declaration of all united in one common design, a principle which is wholly unaffected by the consideration of their being jointly indicted."⁷³ The Supreme Court of Missouri, in a recent case, after referring to the authorities on both propositions, concluded as follows: "While we are constrained to hold in accordance with the rule announced by Mr. Wharton, we do so very reluctantly, for certainly the better practice is, to make all of the conspirators parties defendant to the indictment, or to aver therein the existence of such conspiracy, the parties thereto if known, and their purpose, for then the defendant upon trial will have reason to anticipate what evidence will, or may be, offered against him, and to prepare to meet the same; otherwise he will not."⁷⁴ On the contrary doctrine the Supreme Court of Louisiana say: "It is too elementary to require reasoning, that if the indictment did not charge a conspiracy, the conversations were not admissible."⁷⁵

⁷² Scott v. State, 30 Ala. 503; Clinton v. Estes, 20 Ark. 216; Card v. State, 109 Ind. 415, 9 N. E. 591; Commonwealth v. Smith, 151 Mass. 491, 24 N. E. 677; State v. Thaden, 43 Minn. 253, 45 N. W. 447; Pacific &c. Co. v. Gentry, 38 Ore. 275, 61

Pac. 422; Baker v. State, 80 Wis. 416, 50 Pac. 518.

⁷³ Wharton Cr. Ev., § 700; Bishop New Cr. Proc., §§ 1248, 1249; 3 Greenleaf Ev., § 92.

⁷⁴ State v. Kennedy, 177 Mo. 98, 75 S. W. 979.

⁷⁵ State v. Carroll, 31 La. Ann. 860.

§ 2946. Overt acts—Proof of not required.—As the criminal conspiracy consists in the corrupt agreement or combination to commit an illegal act, or to commit some act detrimental to others by unlawful means, it is therefore evident that the crime is complete when the unlawful purpose or agreement is consummated. It is the generally recognized rule that proof of any overt acts in furtherance of the common design, is unnecessary; in seeking to establish the offense it is sufficient to prove the corrupt or the unlawful arrangement and combination without making or offering any proof whatever as to its completion or consummation. The rule is well stated as follows: "A conspiracy is in and of itself a distinct, substantive offense; complete when the corrupt agreement is entered into; the agreement is the gist of the offense. It is not necessary that any act should be done in pursuance of the agreement; nor is the offense purged because subsequent events may render the consummation of the agreement impossible, or because the conspirators are entrapped in an attempt at its consummation."⁷⁶ It is said "the essence of the offense is the criminal combination, and no overt act is necessary to constitute it."⁷⁷ This rule seems to be based on the theory that the conspirators presume that their scheme will not be discovered or frustrated, and that it will proceed until the object is attained. When their purpose is thwarted they cannot escape on the ground of innocence because the scheme miscarried.⁷⁸ The rule that proof of overt acts is not required to establish the conspiracy is not intended to exclude such proof. It is competent and proper to prove such overt acts because of their bearing upon the evidence of the conspiracy itself, and for the further reason that such evidence is proper in considering the punishment to be inflicted.⁷⁹

§ 2947. Overt acts—When proof necessary.—There are cases holding that under certain circumstances proof of overt acts is necessary in order to establish the crime of conspiracy. These cases are

⁷⁶ *Thompson v. State*, 106 Ala. 67, 17 So. 512; *Commonwealth v. Ward*, 92 Ky. 158, 17 S. W. 283; *Commonwealth v. Judd*, 2 Mass. 329; *People v. Saunders*, 25 Mich. 119; *St. Louis v. Fitz*, 53 Mo. 582; *State v. Straw*, 42 N. H. 393; *People v. Mather*, 4 Wend. (N. Y.) 229; *Commonwealth v. Bliss*, 12 Phila. (Pa.) 580; *John-*

son v. State, 3 Tex. App. 590; *Martens v. Reilly*, 109 Wis. 464, 84 N. W. 840; *United States v. Watson*, 17 Fed. 145.

⁷⁷ *State v. Wilson*, 30 Conn. 500.

⁷⁸ *Musgrave v. State*, 133 Ind. 297, 32 N. E. 885.

⁷⁹ *People v. Arnold*, 46 Mich. 268, 9 N. W. 406.

for the most part under particular statutes either giving a special definition for conspiracy and prescribing the proof to establish it, or where the conspiracy was to commit a misdemeanor.⁸⁰ Where a statute changed the common law rule and required some proof of overt acts it was held that proof must show both the conspiracy and some overt act.⁸¹ But it has been expressly held that such overt act required to be proved need not be in itself criminal, or amount to a crime.⁸² It is sufficient, however, if the overt act proved was done by any one of the alleged conspirators.⁸³ Under this rule it has been held that a party who did not join in the original conspiracy cannot be convicted.⁸⁴

§ 2948. Overt acts and conspiracy merged.—There is a class of cases holding that where the proof shows that the conspiracy had been carried into execution, and the crime itself actually committed, the conspiracy is merged in the crime and there can be no conviction for the conspiracy as a separate offense. The authorities are not harmonious on this doctrine, but in a general way arrange themselves into three separate classes: (1) one class establishes the principle that when the proof shows a conspiracy to commit a higher offense and the offense is actually committed, the conspiracy is merged;⁸⁵ (2) a second class holds that when the proof shows that the conspiracy and the crime are of the same grade there is no merger;⁸⁶ (3) and a third

⁸⁰ *People v. Daniels*, 105 Cal. 262, 38 Pac. 720; *People v. Flack*, 125 N. Y. 324, 26 N. E. 267.

⁸¹ *People v. Sheldon*, 139 N. Y. 251, 34 N. E. 785; *United States v. Hirsch*, 100 U. S. 33; *United States v. Smith*, 2 Bond (U. S.) 323; *United States v. Barrett*, 65 Fed. 62; *United States v. Cassidy*, 67 Fed. 698.

⁸² *United States v. Thompson*, 12 Sawy. (U. S.) 151.

⁸³ *United States v. Barrett*, 65 Fed. 62.

⁸⁴ *United States v. Hirsch*, 100 U. S. 33.

⁸⁵ *Elsey v. State*, 47 Ark. 572; *Commonwealth v. Blackburn*, 1 Duv. (Ky.) 4; *State v. Mayberry*, 48 Me.

218, 238; *Commonwealth v. Kingsbury*, 5 Mass. 106; *Commonwealth v. O'Brien*, 12 Cush. (Mass.) 84; *People v. Richards*, 1 Mich. 217; *People v. Arnold*, 46 Mich. 268, 9 N. W. 406; *People v. Mather*, 4 Wend. (N. Y.) 229, 265; *State v. Noyes*, 25 Vt. 415; *Lambert v. People*, 9 Cow. (N. Y.) 578; *Elkin v. People*, 28 N. Y. 177; *People v. McKane*, 7 Misc. (N. Y.) 478, 28 N. Y. S. 397; *People v. Willis*, 24 Misc. (N. Y.) 537, 54 N. Y. S. 129.

⁸⁶ *State v. Mayberry*, 48 Me. 218; *People v. Arnold*, 46 Mich. 268, 9 N. W. 406; *People v. Mather*, 4 Wend. (N. Y.) 229; *Orr v. People*, 63 Ill. App. 305.

class holds that if the proof shows the conspiracy itself is of a higher grade than the crime actually committed then there is no merger.⁸⁷

§ 2949. Labor combinations—When criminal.—In recent years much discussion and litigation have arisen on the proposition of the criminality of labor combinations. It is generally conceded by law writers and courts that it is both lawful and commendable for men to associate themselves together for the purpose of bettering their condition as laborers or in a financial or social way. It has been stated that it is the genius of our free institutions that invites the citizens of the country to higher levels and better fortunes. The right is conceded to organize labor, to dictate in a way the wages for its members, and that its members may select their own associates, choose their own employers, and do whatever may be lawful or proper to advance their interests and accomplish their purposes. But on the other hand, the law, as stated by writers and recognized by courts is "that all conspiracies whatever wrongfully to prejudice a third person are wholly criminal at common law."⁸⁸ The rule is thus stated by another eminent writer on criminal law: "A combination is a conspiracy in law whenever the act to be done has a necessary tendency to prejudice the public, or oppresses individuals, by unjustly subjecting them to the power of the confederates and giving effect to the purposes of the latter, whether of extortion or mischief."⁸⁹

§ 2950. Labor combinations—Vermont rule.—The Supreme Court of Vermont, after a review of the English and American cases, practically forecloses the entire question in the following language: "The principle upon which the cases, English and American, proceed is, that every man has the right to employ his talents, industry and capital as he pleases, free from the dictation of others; and if two or more persons combine to coerce his choice in his behalf, it is a criminal conspiracy. The labor and skill of the workman, be it of high or low degree, the plant of the manufacturer, the equipment of the farmer, the investments of commerce, are all in equal sense property. If men by overt acts of violence destroy either, they are guilty

⁸⁷ Commonwealth v. Blackburn, 62 Ky. 4; State v. Murray, 15 Me. 100; People v. Richards, 1 Mich. 217; People v. Petheram, 64 Mich. 252, 31 N. W. 188; State v. Noyes, 25 Vt. 415. ⁸⁸ 2 Russell Crimes 674. ⁸⁹ 2 Wharton Cr. Law, § 2322; 2 Bishop Cr. Law, § 172; Desty Cr. Law, § 11; 3 Chitty Cr. Law 1138; Archibald Cr. Pr. & Pl. 1830.

of crime. The anathemas of a secret organization of men combined for the purpose of controlling the industry of others by a species of intimidation that works upon the mind rather than the body, are quite as dangerous, and generally altogether more effective, than acts of actual violence. And while such conspiracies may give to the individual directly affected by them a private right of action for damages, they at the same time lay a basis for an indictment on the grounds that the state itself is directly concerned in the promotion of all legitimate industries and the development of all its resources, and owes the duty of protection to its citizens engaged in the exercise of their callings. The good order, peace and general prosperity of the state are directly involved in the question. . . . The exposure of a legitimate business to the control of an association that can order away its employes and frighten away others that it may seek to employ, and thus be compelled to cease the further prosecution of its work, is a condition of things utterly at war with every principle of justice, and with every safeguard of protection that citizens under our system of government are entitled to enjoy. The direct tendency of such intimidations is to establish over labor and over all industries, a control that is unknown to the law, and that is exerted by a secret association of conspirators, that is actuated solely by personal consideration, and whose plans, carried into execution, usually result in violence and the destruction of property.”⁹⁰ Substantially the same rule, stated by an English court, and adopted by the courts of many jurisdictions, is as follows: “The whole law of conspiracy, as it has been administered at least for the last hundred years, has been thus called in question; for we have sufficient proof that during that period any combination to prejudice another unlawfully has been considered as constituting the offense so called. The offense has been held to consist in the conspiracy, and not in the acts committed for carrying it into effect; and the charge has been held to be sufficiently made in general terms describing an unlawful conspiracy to effect a bad purpose.”⁹¹

§ 2951. Labor combinations—Strikes, boycott and picketing. The law recognizes that labor organizations become unlawful when their members unite or combine to accomplish an unlawful purpose, or when they by combination attempt to accomplish a lawful purpose

⁹⁰ State v. Stewart, 59 Vt. 273, 9 Atl. 559.

⁹¹ State v. Stewart, 59 Vt. 273, 9 Atl. 559.

by unlawful means. When the proof shows that the object or purpose is to be accomplished in either of these ways according to the rules of law the combination becomes a criminal conspiracy. The adjudicated cases show that relief may be had by a civil action for damages, by injunction, or by criminal prosecution. It is not within the scope of this chapter to give the rules governing the introduction of evidence, or the sufficiency of the proof in establishing either the civil liability or the criminal offenses growing out of strikes, boycotts and picketings. It will be considered sufficient to refer to the cases generally involving civil actions for damages, injunctive relief and criminal prosecutions.⁹²

⁹² *Santa Clara &c. Co. v. Hayes*, 76 Cal. 387, 18 Pac. 391; *Vulcan &c. Co. v. Hercules &c. Co.*, 96 Cal. 510, 31 Pac. 581; *State v. Glidden*, 55 Conn. 46, 8 Atl. 890; *Smith v. People*, 25 Ill. 17; *People v. Chicago Gas &c. Co.*, 130 Ill. 268, 22 N. E. 798; *More v. Bennett*, 140 Ill. 69, 29 N. E. 888; *Distilling &c. Co. v. People*, 156 Ill. 448, 41 N. E. 188; *Doremus v. Hennessy*, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524; *London Guarantee &c. Co. v. Horn*, 206 Ill. 493, 69 N. E. 526; *Bruschke v. Furniture Makers' Union*, 18 Chicago Leg. News 306; *Jackson v. Stanfield*, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14; *Clemmitt v. Watson*, 14 Ind. App. 38, 42 N. E. 367; *Schulten v. Bavarian Brew. Co.*, 96 Ky. 224, 28 S. W. 504; *Brewster v. Miller*, 101 Ky. 368, 41 S. W. 301; *Heywood v. Tillson*, 75 Me. 225; *Perkins v. Pendleton*, 90 Me. 166; *Kimball v. Harman*, 34 Md. 407; *Lucke v. Clothing Cutters' &c.*, 77 Md. 396, 26 Atl. 505; *Commonwealth v. Hunt*, 4 Metc. (Mass.) 111; *Bowen v. Matheson*, 14 Allen (Mass.) 499; *Carew v. Rutherford*, 106 Mass. 1; *Walker v. Cronin*, 107 Mass. 555; *Snow v. Wheeler*, 113 Mass. 179; *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307; *Vegelahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077; *Hartnett v. Plumbers' Supply Asso.*, 169 Mass. 229, 47 N. E. 1002; *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011; *People v. Petheram*, 64 Mich. 252, 31 N. W. 188; *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. 1102; *Lovejoy v. Michels*, 88 Mich. 15, 49 N. W. 901; *Beck v. Teamsters' &c. Union*, 118 Mich. 497, 77 N. W. 13; *United States &c. Co. v. Iron Molders' Union*, 129 Mich. 354, 88 N. W. 889; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119; *Ertz v. Produce Exchange*, 79 Minn. 140, 81 N. W. 737; *Ertz v. Produce Exchange*, 82 Minn. 173, 84 N. W. 743; *American &c. Ins. Co. v. State*, 75 Miss. 24, 22 So. 99; *Hamilton-Brown &c. Co. v. Saxey*, 131 Mo. 212, 32 S. W. 1106; *Walsh v. Association Master Plumbers*, 97 Mo. App. 280, 71 S. W. 455; *Mapstrick v. Range*, 9 Neb. 390, 2 N. W. 739; *McCartney v. Berlin*, 31 Neb. 411, 47 N. W. 1111; *State v. Burnham*, 15 N. H. 396; *State v. Norton*, 23 N. J. L. 44; *State v. Donaldson*, 32 N. J. L. 151; *Van Horn v. Van Horn*, 52 N. J. L. 284, 20 Atl. 485; *Mayer v. Journeymen &c. Asso.*, 47 N. J. Eq. 519, 20 Atl. 492; *Barr v. Essex &c. Council*, 53 N. J. Eq. 101, 30 Atl. 881; *Cumberland &c. Co. v. Glass Bottle &c. Asso.*, 59 N. J. Eq. 49, 46 Atl. 208; *Frank*

- v. Herold, 68 N. J. Eq. 443, 52 Atl. 152; Delaware &c. R. Co. v. Bowns, 58 N. Y. 573; Buffalo &c. Oil Co. v. Standard Oil Co., 106 N. Y. 669, 12 N. E. 826; Leonard v. Poole, 114 N. Y. 371, 21 N. E. 707; People v. Barondess, 133 N. Y. 649, 31 N. E. 240; People v. Sheldon, 139 N. Y. 251, 34 N. E. 785; Reynolds v. Everett, 144 N. Y. 189, 39 N. E. 72; People v. Milk Exchange, 145 N. Y. 267, 39 N. E. 1062; Curran v. Galen, 152 N. Y. 33, 46 N. E. 297; Davis v. Zimmerman, 91 Hun (N. Y.) 489, 36 N. Y. S. 303; Master &c. Asso. v. Walsh, 2 Daly (N. Y.) 1; Gilbert v. Mickle, 4 Sandf. Ch. (N. Y.) 357; People v. Fisher, 14 Wend. (N. Y.) 9; Jones v. Westervelt, 7 Cow. (N. Y.) 445; Johnston Co. v. Meinhardt, 60 How. Pr. (N. Y.) 168; Coons v. Chrystie, 24 Misc. (N. Y.) 296, 53 N. Y. S. 668; Reformers Club &c. v. Laborers' &c. Soc., 29 Misc. (N. Y.) 247, 60 N. Y. S. 388; Rogers v. Eberts, 17 N. Y. S. 264; People v. Smith, 10 N. Y. St. 730; People v. Walsh, 15 N. Y. St. 17; People v. Wilzig, 4 N. Y. Cr. 403; People v. Kostka, 4 N. Y. Cr. 429; Emery v. Ohio Candle Co., 47 Ohio St. 320, 24 N. E. 660; Moores v. Bricklayers' Union, 23 Cin. L. Bul. 48, 10 Ohio Dec. (Reprint) 665; Dayton Mfg. Co. v. Metal Polishers' &c. Union, 8 Ohio N. P. 574; Richter v. Journeymen Tailors' Union, 24 Cin. L. Bul. 189; Perkins v. Rogg, 28 Cin. L. Bul. 32, 11 Ohio Dec. (Reprint) 585; New York &c. R. Co. v. Wenger, 17 Cin. L. Bul. 306; Longshore &c. Co. v. Howell, 26 Ore. 527, 38 Pac. 547; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; Newman v. Commonwealth, 5 Cent. Rep. 497; Brace v. Evans, 3 Ry. & Corp. L. J. 561; Cook v. Dolan, 19 Pa. Co. Ct. 401; Wildee v. McKee, 111 Pa. St. 335, 2 Atl. 108; Murdock v. Walker, 152 Pa. St. 595, 25 Atl. 492; Cote v. Murphy, 159 Pa. St. 420, 28 Atl. 190; Buchanan v. Kerr, 159 Pa. St. 433, 28 Atl. 195; Wick China Co. v. Brown, 164 Pa. St. 449, 30 Atl. 261; Macauley v. Tierney, 19 R. I. 255, 33 Atl. 1; Manufacturers' &c. Co. v. Longley, 20 R. I. 86, 37 Atl. 535; Payne v. Western &c. R. Co., 13 Lea (Tenn.) 507; Delz v. Winfree, 80 Tex. 400, 16 S. W. 111; Texas &c. Co. v. Adoue, 83 Tex. 650, 19 S. W. 274; People v. O'Loughlin, 8 Utah 133, 1 Pac. 653; State v. Stewart, 59 Vt. 273, 9 Atl. 559; State v. Dyer, 67 Vt. 690, 32 Atl. 814; Boutwell v. Marr, 71 Vt. 1, 42 Atl. 607, 43 L. R. A. 803; Crump v. Commonwealth, 84 Va. 927, 6 S. E. 620; Murray v. McGarigle, 69 Wis. 483, 34 N. W. 522; Martens v. Reilly, 109 Wis. 464, 84 N. W. 840; State v. Huegin, 110 Wis. 189, 85 N. W. 1046; Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1301; Debs, In re, 158 U. S. 564, 15 Sup. Ct. 900; United States v. Trans-Missouri &c. Asso., 166 U. S. 290, 17 Sup. Ct. 540; United States v. Kane, 23 Fed. 748; Wabash R. Co., In re, 24 Fed. 217; Old Dominion &c. Co. v. McKenna, 24 Blatch. (U. S.) 244, 30 Fed. 48; Emac v. Kane, 34 Fed. 47; Casey v. Typographical Union, 45 Fed. 135; Cœur d'Alene &c. Co. v. Miners' Union, 51 Fed. 260; Toledo &c. R. Co. v. Pennsylvania Co., 54 Fed. 730; United States v. Workingmen's &c. Council, 54 Fed. 994; Waterhouse v. Comer, 55 Fed. 149; United States v. Patterson, 55 Fed. 605; Farmers' Loan &c. Co. v. Northern Pac. R. Co., 60 Fed. 803; Lake Erie &c. R. Co. v. Bailey, 61 Fed. 494; Southern &c. R. Co. v. Rutherford, 62 Fed. 796; Thomas v. Cincinnati &c. R. Co., 62 Fed. 803; Arthur v. Oakes, 11 C. C. A. 209, 63 Fed. 310, 25 L. R. A. 414; United States v. Elliott, 64 Fed. 27; Dueber &c. Co. v. Howard &c. Co.,

66 Fed. 637; Continental Ins. Co. v. Board &c., 67 Fed. 310; Oxley Stave Co. v. Coopers' &c. Union, 72 Fed. 695; Consolidated Steel &c. Co. v. Murray, 80 Fed. 811; Hopkins v. Oxley Stave Co., 83 Fed. 912; United States v. Weber, 114 Fed. 950; Reg. v. Rowlands, 17 Ad. & E. 67; Reg. v. Harris, 1 Car. & M. 661; Reg. v. Selsby, 5 Cox Cr. Cas. 495, note; Wood v. Barrow, 10 Cox Cr. Cas. 344; Reg. v. Druitt, 10 Cox Cr. Cas. 592; Reg. v. Shepherd, 11 Cox Cr. Cas. 325; Reg. v. Bunn, 12 Cox Cr. Cas. 316; Reg. v. Hibbert, 13 Cox Cr. Cas. 82; Reg. v. Bauld, 13 Cox Cr. Cas. 282; Rex v. Mawbey, 6 Term R. 619; Hilton v. Eckersley, 6 E. & B. 47; Walsby v. Anley, 3 E. & E. 516; Rex v. Eccles, 3 Doug. 337; Gregory v. Duke of Brunswick, 6 M. & G. 205; Tarlton v. McGawley, Peak N. P. 205; Rex v. Ferguson, 2 Stark. 431; Reg. v. Aspinall, L. R. 2 Q. B. 48; Mogul &c. Co. v. McGregor, L. R. 21 Q. B. 544; Allen v. Flood, L. R. 23 App. Cas. 1; Springhead &c. Co. v. Riley, L. R. 6 Eq. Cas. 551.

CHAPTER CXL.

COUNTERFEITING.

Sec.	Sec.
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§ 2952. **Generally.**—Counterfeiting coin is the making of false or spurious coin to imitate, or in the similitude of, the genuine coin.¹ Counterfeiting the coin of the realm was a crime at common law, and so, it seems, was the passing of such counterfeit coin or the having it in possession with intent to pass it as the true coin. The possession of instruments for counterfeiting coin was also a crime. Passing a false note purporting to be that of a bank having no existence, or the like, was also punishable as a form of cheating. Under the laws of the United States and of the various states, the offense of counterfeiting has been much extended, and it includes the counterfeiting of other money as well as coin, and of various other securities, evidence of indebtedness and the like. The crime of counterfeiting is distinguished from forgery in that in the former there must be a similitude or resemblance to the coin or instrument counterfeited, while in the latter no such resemblance is required.² The similitude, it is said, must be such as would deceive a person exercising ordinary caution,³ but whether it is such in the particular case is generally a

¹ Bishop New Cr. Law, § 289; see also, *United States v. Abram*, 18 Fed. 823. "Counterfeiting is a species of forgery. The term is usually applied to the making and uttering false money or forging bank notes which are the equivalent of money." *People v. Molineux*, 62 L. R. A. 257, note.

² May Cr. Law, § 94; see also, *Hale v. State*, 120 Ga. 183, 47 S. E. 531.

³ *United States v. Hopkins*, 26 Fed. 443; *United States v. Morrow*, 1 Wash. (U. S.) 733; *United States v. Kuhl*, 85 Fed. 624; *State v. Carr*, 5 N. H. 367; *Dement v. State*, 2 Head (Tenn.) 505, 75 Am. Dec. 747; *Reg. v. Byrne*, 6 Cox Cr. Cas. 475; *Rex v. Walsh*, 1 East P. C. 87.

question for the jury.⁴ An essential element of the offense is the fraudulent intent, or intent to deceive.⁵ Counterfeiting may be a crime under the state statute as well as under the act of Congress, and the fact that it is a crime under the laws of the United States does not deprive the state courts of jurisdiction in so far as the act is a crime under the state law.⁶

§ 2953. **What must be proved—Burden—Presumption.**—It is evident that what must be proved depends largely upon the particular offense charged and the particular statute upon which the prosecution is based. All the essential elements of the offense charged, or, in other words, all the facts necessary to constitute that offense must be proved.⁷ Thus it has been held necessary in particular cases to prove guilty knowledge,⁸ circulation of the money counterfeited,⁹ and the existence of a genuine bank-bill such as is charged to have been counterfeited.¹⁰ So, it has been held that intent to defraud a particular person must be proved when alleged.¹¹ And, as already stated, the similitude or resemblance to the genuine must generally be made to appear. But it has been held that it is not necessary to prove that the notes described in the indictment and those given in evidence are the same,¹² or that such genuine coin of the same country exists as the counterfeit purports to be in imitation of, as the courts will take

⁴ *United States v. Hopkins*, 26 Fed. 443; *United States v. Stevens*, 52 Fed. 120.

⁵ *United States v. King*, 5 McLean (U. S.) 208, 26 Fed. Cas. No. 15535; *Mattison v. State*, 3 Mo. 421; *People v. Molins*, 7 N. Y. Cr. 51, 10 N. Y. S. 130; *People v. Page*, 1 Idaho 189, 191; *People v. White*, 34 Cal. 183; *Gabe v. State*, 6 Ark. 540; but see, *United States v. Russell*, 22 Fed. 390.

⁶ *People v. McDonnell*, 80 Cal. 285, 22 Pac. 190, 13 Am. St. 159; *Commonwealth v. Fuller*, 8 Metc. (Mass.) 313; *Dashing v. State*, 78 Ind. 357; *United States v. Cruikshank*, 92 U. S. 542; *Prigg v. Pennsylvania*, 16 Pet. (U. S.) 625; *United States v. Arjona*, 120 U. S. 479, 7 Sup. Ct. 628.

⁷ *Brown v. People*, 9 Ill. 439; *United States v. Fitzgerald*, 91 Fed. 374.

⁸ *Wash v. Commonwealth*, 16 Gratt. (Va.) 530; *State v. Morton*, 8 Wis. 352; *United States v. Roudenbush*, Baldw. (U. S.) 514.

⁹ *State v. Shelton*, 7 Humph. (Tenn.) 31.

¹⁰ *State v. Brown*, 4 R. I. 528, 70 Am. Dec. 168.

¹¹ *Wilkinson v. State*, 10 Ind. 546; but see, *Sasser v. State*, 13 Ohio 453; *United States v. Moses*, 4 Wash. (U. S.) 725, 27 Fed. Cas. No. 15,825; *United States v. Kuhl*, 85 Fed. 624.

¹² *United States v. Moses*, 4 Wash. (U. S.) 726, 27 Fed. Cas. No. 15,825.

judicial notice of the coins of their own country;¹³ and the ingredients of counterfeiting coin need not be proved, even though alleged.¹⁴ It has been said that in prosecutions for counterfeiting there can be no presumption of guilty knowledge as a matter of law, but from the existence of facts there may be presumptions of fact.¹⁵ Thus, the making of the counterfeit being proved, the intent to use it for an unlawful purpose may and generally will be inferred or be presumed;¹⁶ and the act of knowingly passing a counterfeit being proved, the conclusion of intent to defraud necessarily follows,¹⁷ or will, ordinarily at least, be presumed.¹⁸ So, in a prosecution for counterfeiting banknotes or coins, evidence that the notes mentioned in the indictment, and others of like kind, together with plates and implements for making them, were found in the possession of defendant, has been held to constitute prima facie evidence that the defendant was the counterfeiter.¹⁹

§ 2954. Knowledge — Intent — Similar offenses. — As already stated, there must be a criminal intent, and knowledge must also be shown, especially where the indictment is for uttering, passing, or having in possession a counterfeit with intent to pass it. But these elements may be inferred from circumstances in evidence, and direct evidence is not essential.²⁰ Evidence that the defendant was in company with another person a number of times when the latter passed counterfeit bills,²¹ and evidence that the accused and some third

¹³ *United States v. Burns*, 5 McLean (U. S.) 23, 24 Fed. Cas. No. 14,691; *United States v. King*, 5 McLean (U. S.) 208, 26 Fed. Cas. No. 15535; see also, *United States v. Williams*, 4 Biss. (U. S.) 302.

¹⁴ *State v. Beeler*, 1 Brev. (S. Car.) 482; *State v. Griffin*, 18 Vt. 198.

¹⁵ *Wash v. Commonwealth*, 16 Gratt. (Va.) 530.

¹⁶ *State v. McPherson*, 9 Iowa 53.

¹⁷ *People v. Page*, 1 Idaho 189, 190.

¹⁸ *United States v. Shellmire*, Baldw. (U. S.) 370, 27 Fed. Cas. No. 16271.

¹⁹ *Spencer v. Commonwealth*, 2 Leigh (Va.) 751; *United States v. Burns*, 5 McLean (U. S.) 23, 24 Fed. Cas. No. 14691; *United States*

v. King, 5 McLean (U. S.) 208, 26 Fed. Cas. No. 15535.

²⁰ *State v. Smith*, 5 Day (Conn.) 176, 5 Am. Dec. 132; *State v. Brown*, 4 R. I. 528, 70 Am. Dec. 168; *Rex v. Fuller*, Russ. & Ry. C. C. 308; *People v. Page*, 1 Idaho 189; *McGregor v. State*, 16 Ind. 9; *State v. McPherson*, 9 Iowa 53. Evidence that the defendant has been employed in printing genuine bank bills of the kind in question has been held admissible. *Commonwealth v. Hall*, 4 Allen (Mass.) 305.

²¹ *State v. Spalding*, 19 Conn. 233; see also, *Finn v. Commonwealth*, 5 Rand. (Va.) 701; *United States v. Taranto*, 74 Fed. 219.

person had conspired to pass counterfeit money, or that a counterfeit had been passed by some person resembling the defendant,²² or that the defendant had about the same time knowingly uttered other counterfeits,²³ even though he may have been indicted or even tried another time for passing such other counterfeit,²⁴ is admissible to show knowledge or criminal intent. And the defendant's declarations when passing other counterfeit money may be proved against him for the same purpose.²⁵ So, possession of other similar counterfeit money has been held admissible to show knowledge,²⁶ and it has likewise been held that the possession of instruments for making the counterfeit may be shown for the same purpose, under a charge of counterfeiting.²⁷

§ 2955. Possession by accused.—As stated in the preceding section, the possession by the defendant of the tools and instruments²⁸ for coining and counterfeiting the money, or of spurious coin,²⁹ may

²² *People v. Clarkson*, 56 Mich. 164, 22 N. W. 258.

²³ *People v. Frank*, 28 Cal. 507; *State v. Twitty*, 2 Hawks (N. Car.) 248; *Langford v. State*, 33 Fla. 233, 14 So. 815; *State v. Cole*, 19 Wis. 129, 134; *Commonwealth v. Stearns*, 10 Metc. (Mass.) 256; *Commonwealth v. Bigelow*, 8 Metc. (Mass.) 235, 236; *Hendrick's Case*, 5 Leigh (Va.) 707; *Steele v. People*, 45 Ill. 152; *State v. Tindal*, 5 Harr. (Del.) 488, 490; *United States v. Noble*, 5 Cranch (U. S.) 371.

²⁴ *McCartney v. State*, 3 Ind. 353; *Commonwealth v. Stearns*, 10 Metc. (Mass.) 256.

²⁵ *State v. Smith*, 5 Day (Conn.) 175, 5 Am. Dec. 132; *Commonwealth v. Edgerly*, 10 Allen (Mass.) 184.

²⁶ *United States v. Noble*, 5 Cranch (U. S.) 371; *United States v. Hinman*, Baldw. (U. S.) 292; *People v. Molins*, 7 N. Y. Cr. 51, 10 N. Y. S. 130; *State v. Williams*, 2 Rich. L. (S. Car.) 418, 45 Am. Dec. 741; *Commonwealth v. Price*, 10 Gray (Mass.) 472, 71 Am. Dec. 668; *Hess*

v. State, 5 Ohio 5, 22 Am. Dec. 767; but see, *Bluff v. State*, 10 Ohio St. 547.

²⁷ *State v. Antonio*, 3 Brev. (S. Car.) 562; an abstract or synopsis of this case and of many others upon the subject of this section is given in an elaborate note in, 62 L. R. A. 257-264.

²⁸ *State v. Antonio*, 3 Brev. (S. Car.) 562; *Hess v. State*, 5 Ohio 5, 22 Am. Dec. 767. But possession should not be too remote. *State v. Odel*, 3 Brev. (S. Car.) 552.

²⁹ *Stalker v. State*, 9 Conn. 341, 343; *United States v. Hinman*, Baldw. (U. S.) 292; *People v. Thoms*, 3 Park. Cr. Cas. (N. Y.) 256, 262, 270, 3 Abb. App. 571; *State v. Twitty*, 2 Hawks (N. Car.) 248; *State v. Bridgman*, 49 Vt. 202, 210; *People v. White*, 34 Cal. 183. It has been said that the counterfeit money found must be similar in kind to that for which he is on trial for uttering. *Bluff v. State*, 10 Ohio St. 547.

generally be shown, and it is said that such possession, "even subsequent to the act for which he is indicted,"³⁰ may always be proved for the purpose of showing guilty and criminal intent.³¹ But the accused must be allowed to explain his possession, in order to rebut any presumption that may arise against him."³² And it has been held that the fact that counterfeiters' tools were found in the possession of the wife of the accused is not admissible where he exercised no control over them.³³ In many jurisdictions, as already stated, the possession of such tools and appliances, at least with criminal intent, is itself a crime,³⁴ and under some of the statutes it seems that it is sufficient to constitute the offense if the defendant knowingly has them in his possession and secretly keeps them, regardless of his actual intent.³⁵

§ 2956. Existence of bank.—It is sometimes necessary to prove the existence of a bank whose notes are alleged to have been counterfeited. This may, of course, be done by its articles of incorporation, or a duly authenticated copy made evidence of corporate existence by the law.³⁶ But this is not absolutely necessary unless the statute so requires. It may be shown by evidence of a general character, as that it was known and acted as such bank and issued genuine bills of the kind in question.³⁷ So the fact that a certain person,

³⁰ *Commonwealth v. Price*, 10 Gray (Mass.) 472, 71 Am. Dec. 668; *Reg. v. Forster*, 6 Cox Cr. Cas. 521; *Bottomley v. United States*, 1 Story (U. S.) 136.

³¹ "The object of the testimony is not to convict or accuse him of other crimes, but to establish the fact of such a knowledge, on his part, of the true character of the bill uttered by him, and which is proved to be counterfeit, as will justify the jury in inferring his guilt. So far as this may be deemed a departure from the technical rules of evidence, it is a departure justified by the peculiar nature of the crime of passing counterfeit money, which consists not in the fact of passing, which may be done by an innocent person, but in the guilty knowledge connected therewith." Common-

wealth v. Bigelow, 8 Metc. (Mass.) 235.

³² *Underhill Cr. Ev.*, § 433; *United States v. Burns*, 5 McLean (U. S.) 23, 24 Fed. Cas. No. 14,691; *United States v. King*, 5 McLean (U. S.) 208, 26 Fed. Cas. No. 15535; *United States v. Craig*, 4 Wash. (U. S.) 729.

³³ *People v. Thoms*, 3 Park. Cr. Cas. (N. Y.) 256, 3 Abb. App. (N. Y.) 571; but see, *Reg. v. Parker*, 2 Cox Cr. Cas. 274.

³⁴ *People v. White*, 34 Cal. 183; *Commonwealth v. Morse*, 2 Mass. 138.

³⁵ *Sasser v. State*, 13 Ohio 453; *Sutton v. State*, 9 Ohio 133.

³⁶ See, *People v. Chadwick*, 2 Park Cr. Cas. (N. Y.) 163; *Stone v. State*, 20 N. J. L. 401.

³⁷ *People v. Davis*, 21 Wend. (N.

whose name appears on the bills as president, was, in fact, its president, may be shown by parol evidence.³⁸

§ 2957. Admissions.—As a general rule everything that the defendant said or did at the time of the alleged offense, constituting part of the *res gestae*, may be shown by the state.³⁹ His admissions and declarations, though made to others and at other times, are likewise competent against him.⁴⁰ But it has been held that the contents of a letter containing counterfeit money, received by him at the post-office and at once taken from him before he had opened the letter, cannot be shown.⁴¹ The passing of the counterfeit being proved, the defendant's agency may be shown by his own confession without any violation of the rule against proving the *corpus delicti* by the confession of the accused.⁴² So, where a conspiracy is shown, the admissions of one of the conspirators may be competent even against the others.⁴³

§ 2958. Accomplices.—As stated in the last preceding section, the admissions of a co-conspirator may be shown in a proper case, after a conspiracy is proved. But it is a general rule that the evidence of an accomplice is not sufficient to sustain a conviction unless it is supported by corroborating evidence.⁴⁴ It has been held, however, that a detective, or one who, in concert with the police, buys counterfeit money from the accused for the purpose of entrapping him, is not an accomplice within the meaning of the rule.⁴⁵

Y.) 309; *People v. Ah Sam*, 41 Cal. 645; *People v. McDonnell*, 80 Cal. 285, 22 Pac. 190; *Jennings v. People*, 8 Mich. 81; *State v. Pierce*, 8 Iowa 231; *Reed v. State*, 15 Ohio 217.

³⁸ *State v. Smith*, 5 Day (Conn.) 175, 5 Am. Dec. 132.

³⁹ *State v. Smith*, 5 Day (Conn.) 175, 5 Am. Dec. 132; *State v. Phelps*, 2 Root (Conn.) 87; *McCartney v. State*, 3 Ind. 353, 56 Am. Dec. 510; conflicting statements made by him or silence when called upon to speak may be shown; *Commonwealth v. Starr*, 4 Allen (Mass.) 301; *United States v. Kenneally*, 5 Biss. (U. S.) 122.

⁴⁰ *United States v. Craig*, 4 Wash.

(U. S.) 729; *State v. Ford*, 2 Root (Conn.) 93; *Reg. v. Attwood*, 20 Ont. (Can.) 574; *Commonwealth v. Edgerly*, 10 Allen (Mass.) 184.

⁴¹ *Commonwealth v. Edgerly*, 10 Allen (Mass.) 184.

⁴² *United States v. Marcus*, 53 Fed. 784.

⁴³ *Taylor v. United States*, 32 C. C. A. 449, 89 Fed. 954.

⁴⁴ *State v. Pepper*, 11 Iowa 347.

⁴⁵ *People v. Molins*, 7 N. Y. Cr. 51, 10 N. Y. S. 130; *People v. Farrell*, 30 Cal. 316; see also, *Reg. v. Banneu*, 2 Moody C. C. 309; as to sufficiency of corroboration see, *People v. Davis*, 21 Wend. (N. Y.) 309.

§ 2959. Expert evidence.—Expert evidence is usually resorted to in such cases. As a general rule, any person who is well acquainted with the genuine bills or coin of the kind alleged to be counterfeited, may testify upon the subject.⁴⁶ Even where the alleged counterfeit is that of a note of a bank, other witnesses as well as the officers of the bank may be competent.⁴⁷ But it has been held that certain pamphlets known as bank note detectors are not admissible to prove the false or counterfeit character of a note.⁴⁸

§ 2960. Production of counterfeit at trial.—The alleged counterfeit is the best evidence of its character, and it must generally be produced,⁴⁹ unless out of the jurisdiction or in the defendant's possession,⁵⁰ or the like, so that its absence is satisfactorily accounted for.⁵¹ The same rule is generally applied in proving scienter by evidence of the possession or passing of other counterfeits.⁵² But the contrary seems to have been held in Ohio.⁵³

§ 2961. Defenses.—The defendant may introduce any proper evidence tending to disprove or rebut any essential fact in the case made by the state. He may explain his possession of the counterfeit or counterfeiting implements, shown by the state, and generally introduce any proper evidence to meet the inference of his guilt that might otherwise arise from the evidence on the part of the prosecution. He

⁴⁶ *Watson v. Cresap*, 1 B. Mon. (Ky.) 195, 36 Am. Dec. 572; *State v. Allen*, 1 Hawks (N. Car.) 6, 9 Am. Dec. 616; *Martin v. Commonwealth*, 2 Leigh (Va.) 745; and authorities cited in following note.

⁴⁷ *Commonwealth v. Carey*, 2 Pick. (Mass.) 47; *Jones v. State*, 11 Ind. 357; *State v. Tutt*, 2 Bail. L. (S. Car.) 44, 21 Am. Dec. 508; *State v. Carr*, 5 N. H. 367; *Tharpe v. Gishburne*, 2 Car. & P. 21, 12 E. C. L. 8; *Watson v. Cresap*, 1 B. Mon. (Ky.) 195, 36 Am. Dec. 572; *Atwood v. Cornwall*, 28 Mich. 336, 15 Am. R. 219; but see, *State v. Brown*, 4 R. I. 528, 70 Am. Dec. 168; *Payson v. Everett*, 12 Minn. 216.

⁴⁸ *Payson v. Everett*, 12 Minn. 216.

⁴⁹ *State v. Orsborn*, 1 Root (Conn.)

152; *Commonwealth v. Bigelow*, 8 Metc. (Mass.) 235.

⁵⁰ *State v. Potts*, 9 N. J. L. 26, 17 Am. Dec. 449; *State v. Ford*, 2 Root (Conn.) 93; *Armitage v. State*, 13 Ind. 441.

⁵¹ *State v. Cole*, 19 Wis. 129, 88 Am. Dec. 678.

⁵² See, *Commonwealth v. Bigelow*, 8 Metc. (Mass.) 235; *State v. Breckenridge*, 67 Iowa 204, 25 N. W. 130; *Smith's Case*, 4 N. Y. City H. Rec. 166; *People v. Lagrille*, 1 Wheeler Cr. Cas. (N. Y.) 412; *Rex v. Millard*, Russ. & Ry. C. C. 245.

⁵³ *Reed v. State*, 15 Ohio 217; see also, *Kirk v. Commonwealth*, 9 Leigh (Va.) 627; *McGregor v. State*, 16 Ind. 9.

may show, for instance, that he believed the counterfeit bill passed by him to be genuine and had consulted an approved "counterfeit detector" to determine it.⁵⁴ So, testimony that he received the money in the ordinary course of business is admissible on the trial of a charge for having it in his possession, and may be a good defense to such a charge.⁵⁵ The defendant may also show that he was so drunk that he did not know what he was doing and could not tell that the bill was counterfeit.⁵⁶ He may also introduce evidence of his good character.⁵⁷

⁵⁴ State v. Morton, 8 Wis. 167.

States v. Roudenbush, Baldw. (U.

⁵⁵ United States v. Kenneally, 5 S.) 514.
Biss. (U. S.) 122.

⁵⁶ United States v. Kenneally, 5

⁵⁷ Pigman v. State, 14 Ohio 555, 45 Biss. (U. S.) 122; Griffin v. State, Am. Dec. 558; but compare, United 14 Ohio St. 55.

presumption has been held to arise that one has appropriated money to his own use when he can give no reasonable account of a pretended theft shown to have been committed while the money was in his possession.⁷ And it has been held under some statutes that the failure or refusal of a retiring county treasurer to promptly pay over to his successor any of the public money in his hands as such officer, is *prima facie* evidence of embezzlement, and that under such circumstances a presumption of embezzlement would arise.⁸ But such a presumption does not arise upon proof of mere failure to pay money when the accused is not a public officer and the accusation applies to private property, for in such case there must be the necessary criminal intent, and an adverse holding of the property depriving the owner of his possession⁹ must usually be shown. A presumption of fraudulent intent, however arises against a banker who took in money as a deposit after he was insolvent,¹⁰ whereby the money was lost to the depositor, and the banker is presumed or bound to know of his own insolvency.¹¹ A presumption as to venue arises, or, more properly speaking, it may be inferred if it appears that the accused received the property in the county alleged, and that when it was last seen in his possession he was in that county.¹² But this may be rebutted by proof that the property was taken to another county and was there converted to the use of the accused.¹³ Eligibility to office is presumed from an appointment by proper authority in regular form, where the charge is against a public officer for embezzlement.¹⁴ And most of the statutes are construed to include officers *de facto* as well as officers *de jure*.¹⁵ And

⁷ *Riley v. State*, 32 Tex. 763; see also, *Smith v. State*, 34 Tex. Cr. App. 265, 30 S. W. 236.

⁸ *Whitney v. State*, 53 Neb. 287, 73 N. W. 696; see also, *United States v. Adams*, 2 Dak. 305, 9 N. W. 718; *People v. Warren*, 122 Mich. 504, 81 N. W. 360, 80 Am. St. 582; but compare, *Robinson v. State*, 109 Ga. 564, 35 S. E. 57, 77 Am. St. 392; *State v. Hunnicut*, 34 Ark. 562; *People v. Westlake*, 124 Cal. 452, 57 Pac. 465.

⁹ *Fitzgerald v. State*, 50 N. J. L. 475, 14 Atl. 746; *Robinson v. State*, 109 Ga. 564, 35 S. E. 57, 77 Am. St. 392; *Chaplin v. Lee*, 18 Neb. 440, 25 N. W. 609; *State v. Butler*, 21 S. Car. 353; *Henderson v. State*, 129

Ala. 104, 29 So. 799; *People v. Bauman*, 105 Mich. 543, 63 N. W. 516.

¹⁰ *Commonwealth v. Rockafellow*, 163 Pa. St. 139, 29 Atl. 757; *American &c. Bank v. Gunder &c. Mfg. Co.*, 150 Ill. 336, 37 N. E. 227.

¹¹ *Meadowcroft v. People*, 163 Ill. 56, 45 N. E. 303, 35 L. R. A. 176, 54 Am. St. 447.

¹² *Wallis v. State*, 54 Ark. 611, 16 S. W. 821; see also, *Robson v. State*, 83 Ga. 166, 9 S. E. 610; *State v. Small*, 26 Kans. 209.

¹³ *State v. New*, 22 Minn. 76.

¹⁴ *State v. Ring*, 29 Minn. 78, 11 N. W. 233.

¹⁵ *State v. Stone*, 40 Iowa 547; *State v. Goss*, 69 Me. 22; *Bartley v.*

it has been held that in the absence of proof of a criminal intent, the act of a servant giving away old tools belonging to his master will raise a presumption that he did so as a matter of charity rather than with an intent to embezzle them.¹⁶

§ 2965. Burden of proof.—The same rule as to burden of proof holds in embezzlement as in other criminal cases, that is, the burden of proving the commission of the crime and the criminal agency is upon the state.¹⁷ In general, under most of the statutes, it may be stated that the burden of proof is upon the prosecution to establish beyond a reasonable doubt four distinct propositions or elements of fact.¹⁸ That is, it must be established, that the accused was the agent of the person or corporation, and that he, by the terms of his employment, was charged with receiving the money or property of his principal. It must also be established that as a matter of fact he did come into the possession of the property. It must appear that he received it in the course of his employment. And lastly, it must be established that the accused, knowing that the property was not his, converted it to his own use or to the use of another who is not the true owner.¹⁹ The burden of proof is on the state, under most of the statutes, to show that the thing embezzled came into the possession of the accused by virtue of his employment as an agent or bailee or the like.²⁰ It has been held, however, that on a prosecution against an agent for embezzlement there is no burden on the state to prove that the money embezzled was the property of the defendant's

State, 53 Neb. 310, 73 N. W. 744; App. 417; Webb v. State, 8 Tex. Fortenberry v. State, 56 Miss. 286; App. 310.
Reg. v. Townsend, C. & M. 178, 41 E. C. L. 102.

¹⁶ State v. Fritchler, 54 Mo. 424.

¹⁷ State v. Fritchler, 54 Mo. 424; Strong v. State, 18 Tex. App. 19; State v. Foster, 1 Pen. (Del.) 289, 40 Atl. 939.

¹⁸ Leonard v. State, 7 Tex. App. 417; People v. Cobler, 108 Cal. 538, 41 Pac. 401.

¹⁹ State v. Blackley, (N. Car.) 50 S. E. 310, 312; State v. Schingen, 20 Wis. 79; Hedley, Ex parte, 31 Cal. 108; People v. Cobler, 108 Cal. 538, 41 Pac. 401; Leonard v. State, 7 Tex.

²⁰ Bartow v. People, 78 N. Y. 377; State v. Cooper, 102 Iowa 146, 71 N. W. 197; State v. Mahan, 138 Mo. 112, 39 S. W. 465; McAleer v. State, 46 Neb. 116, 64 N. W. 358; Hadley, Ex parte, 31 Cal. 108; see also, Wynegar v. State, 157 Ind. 577, 62 N. E. 38; Johnson v. Commonwealth, 5 Bush (Ky.) 430; as to what is sufficient to show this, see, Ricord, Ex parte, 11 Nev. 287; Commonwealth v. Clifford, 96 Ky. 4, 27 S. W. 811; State v. Kortgaard, 62 Minn. 7, 64 N. W. 51.

principal.²¹ And it has been said that when a prima facie case of embezzlement is made out against one handling the wares of another, it is incumbent on the former to prove, as he claimed, that he had in good faith sold them on credit.²² So, where the prosecution has made a prima facie case of embezzlement, it becomes incumbent upon the defendant to adduce evidence in denial or explanation of the incriminating circumstances.²³ And where the statute against embezzlement contains an exception or exemption, it has been held that one claiming to come under said provision has the burden of establishing that he comes under such exception or exemption. But, when necessary to be shown, the burden of proof is on the state to establish efforts of the accused to conceal or dispose of the property or money.²⁴

§ 2966. Question of law or fact.—The ordinary rules as to questions of law or fact apply in embezzlement. Thus, the interpretation of a written contract, relied on by the state as establishing the relation of principal and agent, between the defendant and the prosecuting witness, is for the court.²⁵ But it is a question for the jury to determine whether a relation of master and servant has existed between the prosecutor and the accused in the absence of any written contract when there is a dispute as to the facts.²⁷ The question of the intent with which a party appropriated money or property is usually a question of fact.²⁸ So, where it was necessary to determine in an embezzlement case, whether a certain transaction was a pledge or pawn, this has been held to be a question for the jury under proper instructions.²⁹ Thus, where a stranger who had hired a horse and buggy in another county, went to a liveryman to borrow money, saying, "I will leave the horse and buggy here with you, and will return tonight or tomorrow and pay you the money," and, after getting the money, left

²¹ *Willis v. State*, 134 Ala. 429, 33 So. 226.

²² *Bridgers v. State*, 8 Tex. App. 145.

²³ *Riley v. State*, 32 Tex. 763; *Bridgers v. State*, 8 Tex. App. 145; *Hemingway v. State*, 68 Miss. 371, 8 So. 317; but see, *State v. McDonald*, 133 N. Car. 680, 45 S. E. 582; *Lambeth v. State*, 3 Tenn. Cas. 754.

²⁴ *State v. Tompkins*, 32 La. Ann. 620; *Stallings v. State*, 29 Tex. App.

220, 15 S. W. 716; *Fleener v. State*, 58 Ark. 98, 23 S. W. 1; *State v. Pierce*, 77 Iowa 245, 42 N. W. 181.

²⁵ *State v. Brown*, 171 Mo. 477, 71 S. W. 1031.

²⁷ *Reg. v. Foulkes*, 13 Cox Cr. Cas. 63.

²⁸ *State v. Trolson*, 21 Nev. 419, 32 Pac. 930.

²⁹ *Wilson v. State*, (Fla.) 36 So. 580.

the horse and buggy and never returned, the question of whether a pledge or pawn was thereby intended was held to be a question for the jury under proper instructions.⁸⁰ And whether a claim of right to retain the fund was asserted by the accused in good faith has also been held to be a question for the jury.⁸¹

§ 2967. **Evidence of intent.**—Intent from its very nature is not capable of being proved directly, and consequently the courts allow much latitude as to its proof; almost any proper evidence is admitted which has the least tendency to establish fraudulent intent. So, on the other hand, the same latitude is allowed to show the good faith and intention of the one charged with embezzlement.⁸² As said in one case: "In embezzlement generally the very confidence and trust reposed furnish the most potent means for its accomplishment and effectual concealment, so that guilt can generally be established only by reasonable inferences drawn from the general course of conduct of such officer, agent, clerk or servant, with respect to the subject matter of his trust, and from all the facts and circumstances surrounding his acts, which tend to throw light upon or illustrate their nature."⁸³ Evidence that the accused has committed offenses similar to that in question is often admitted on the question of intent or motive.⁸⁴ Where one intrusted with the keeping of property has fled carrying with him the proceeds of the sale thereof, such fact may be considered by the jury in determining whether the sale was felonious.⁸⁵ It has been held that upon the trial of an indictment of a broker, evidence of a custom among brokers may be received to show the absence of fraudulent intent, if the custom be a legal one; but that evidence of a custom which is not legal should not be admitted for any purpose.⁸⁶ And as evidence of intent it has been held admissible to show that

⁸⁰ *Wilson v. State*, (Fla.) 36 So. 580.

⁸¹ *State v. Lewis*, 31 Wash. 75, 71 Pac. 778.

⁸² *People v. Pollock*, 51 Hun (N. Y.) 613, 4 N. Y. S. 297; *Govatos v. State*, 116 Ga. 592, 42 S. E. 708; *People v. Tomlinson*, 102 Cal. 19, 36 Pac. 506.

⁸³ *Reeves v. State*, 95 Ala. 31, 11 So. 158.

⁸⁴ *Commonwealth v. Tuckerman*, 10 Gray (Mass.) 173; *State v. Pit-*

tam, 32 Wash. 137, 72 Pac. 1042; *Taylor v. Commonwealth*, (Ky.) 75 S. W. 244; *People v. Van Ewan*, 111 Cal. 144, 43 Pac. 520; *State v. Holmes*, 65 Minn. 230, 68 N. W. 11; *People v. Hawkins*, 106 Mich. 479, 64 N. W. 736; *Rex v. Ellis*, 6 Barn. & C. 145, 13 E. C. L. 123.

⁸⁵ *Commonwealth v. Hurd*, 123 Mass. 438.

⁸⁶ *Commonwealth v. Cooper*, 130 Mass. 285.

the books of the company whose funds were embezzled, and of which the defendant was president, had been falsified by fraudulent entries, made with a view to conceal the embezzlement, at the defendant's instance and with his knowledge, whether made at the time of the act charged or afterwards.³⁷ An intent to restore the property is immaterial if the property has been placed beyond the control of the accused.³⁸ Thus, it has been stated, "to take from their place of deposit the bonds of a depositor and send them out of the state to be used as collateral security for the defendant's own debt, was a fraudulent conversion. Intention to restore the bonds, and the agreement of the party who received them not to sell or dispose of them, cannot do away with the criminal nature of the transaction. A guilty intent is necessarily inferred from the voluntary commission of such an act, the inevitable effect of which is to deprive the true owner of his property and to appropriate it to the defendant's own use. Perhaps in a majority of cases the party who violates his trust in such a manner does not expect or intend that the ultimate loss shall fall upon the person whose property he takes and misuses. But no hope or expectation of replacing the funds abstracted can be admitted as an excuse before the law."³⁹

§ 2968. Written evidence.—Written evidence is admissible in such cases and often is very important evidence. Thus, public records and transcripts and official statements may be admissible in evidence.⁴⁰ In a proper case false entries made in books are often relevant and it need not be shown that they were made at the time of the embezzlement or that they were made by the accused, if it sufficiently shows that they were made at his instance and with his knowledge.⁴¹ But entries in the books of the accused made by others should not ordinarily be received as evidence in the absence of preliminary proof that the attention of the accused was called to such entries.⁴²

³⁷ *Jackson v. State*, 76 Ga. 551; 59 N. W. 237; *State v. Ring*, 29 see also, *Willis v. State*, 134 Ala. Minn. 78, 11 N. E. 233; *Shivers v. State*, 53 Ga. 149; *Tyler v. United States*, 45 C. C. A. 247, 106 Fed. 137.

³⁸ *Spalding v. People*, 172 Ill. 40, 49 N. E. 993; *Harris v. State*, (Tex. Cr. App.) 34 S. W. 922.

³⁹ *Commonwealth v. Tenney*, 97 Mass. 50.

⁴⁰ *Bork v. People*, 16 Hun (N. Y.) 476; *People v. Flock*, 100 Mich. 512,

⁴¹ *Jackson v. State*, 76 Ga. 551; *People v. Wyman*, 102 Cal. 552, 36 Pac. 932.

⁴² *Lang v. State*, 97 Ala. 41, 12 So. 183.

And it has been said that before the books of a party can be admitted in evidence they should be submitted to the inspection of the court, and if they do not appear to contain regular entries made in the course of the daily business of the party, and to have been honestly and fairly kept, they are not admissible.⁴⁴ A check given by a state treasurer in his official capacity is admissible to show the manner of an alleged embezzlement by him, though the official seal was omitted therefrom.⁴⁵ And a draft to the accused is admissible to show receipt of the money alleged to have been embezzled.⁴⁶ So, the annual printed reports of the state treasurer are original official documents and are admissible in a proper case.⁴⁷ And the books of a savings bank, kept by the accused, who was the secretary, when in his handwriting are admissible in evidence to show the amounts received by the accused.⁴⁸ Thus, a cash-book showing the receipts and disbursements, and kept in the bank under the supervision of the defendant as the manager of a bank, is admissible to show the balance of cash on hand at the time of the alleged embezzlement.⁴⁹ And stub duplicates of tax receipts, made by a county treasurer as required by law, are evidence of the receipt of the taxes represented thereby, although they never have been returned by him to the auditor as he is required to do.⁵⁰ And it has been held that letters to the accused are admissible on the question of agency.⁵¹ And so letters written to the accused by the prosecutor, requesting a settlement and accounting have been held admissible.⁵² Also letters from the accused bearing upon his dealings with the funds alleged to have been embezzled are competent.⁵³ And deposit slips have been held admissible, when in the handwriting of the accused for the purpose of showing that the accused properly accounted for the funds alleged to have been embezzled.⁵⁴ So, entries in private books are often admissible. Thus, in a prosecution against an officer, or other agent, entries in books of account made

⁴⁴ *State v. Collins*, 1 Marv. (Del.) 536, 41 Atl. 144.

⁴⁵ *State v. Noland*, 111 Mo. 473, 19 S. W. 715; see also, *State v. Krug*, 12 Wash. 288, 41 Pac. 126.

⁴⁶ *State v. Brooks*, 85 Iowa 366, 52 N. W. 240.

⁴⁷ *People v. McKinney*, 10 Mich. 54.

⁴⁸ *Humphrey v. People*, 18 Hun (N. Y.) 393.

⁴⁹ *People v. Leonard*, 106 Cal. 302, 39 Pac. 617.

⁵⁰ *State v. Ring*, 29 Minn. 78, 11 N. W. 233.

⁵¹ *State v. Adams*, 108 Mo. 208, 18 S. W. 1000.

⁵² *State v. Adams*, 108 Mo. 208, 18 S. W. 1000.

⁵³ *State v. Halstead*, 73 Iowa 376, 35 N. W. 457.

⁵⁴ *State v. Halstead*, 73 Iowa 376, 35 N. W. 457.

by the accused or under his direction, and statements of account, receipts and checks given by him, are admissible, if made or given before the finding of the indictment.⁵⁵

§ 2969. Evidence in general.—The offense may be proved by circumstantial evidence as well as direct evidence.⁵⁶ As a general rule, any proper facts or circumstances bearing upon the possession or custody of the property by the accused or the manner of his holding or receiving such property may be introduced in evidence.⁵⁷ And so it may be stated generally that the prosecution may show any facts which tend materially to prove the receipt by the accused of the money or property alleged to have been embezzled, and a conversion of it by the accused.⁵⁸ Fraudulent vouchers and false statements in regard to the matter are relevant.⁵⁹ So when the accused is an agent, receipts given by him to debtors of his principal over his own name are admissible in evidence against him.⁶⁰ And on a trial for embezzling money, the draft for the money is competent evidence to show how defendant acquired its possession.⁶¹ It has been held competent to show that the books kept by the accused have been falsified by fraudulent entries with a view to conceal the embezzlement, whether they were made at the time of the act charged or afterwards.⁶² And where it was proved that the accused deposited money he was charged with embezzling in a bank, evidence that he checked out the money so deposited was admissible as tending to show conversion of the funds.⁶³ In order to establish embezzlement by a public officer it has been held

⁵⁵ *Commonwealth v. Smith*, 129 Mass. 104; *Denton v. State*, 77 Md. 527, 26 Atl. 1022; *Humphrey v. People*, 18 Hun (N. Y.) 393.

⁵⁶ *State v. Porter*, 26 Mo. 201; *New York Ferry Co. v. Moore*, 12 N. Y. 667, 6 N. E. 293; *Territory v. Meyer*, 3 Ariz. 199, 24 Pac. 183; *State v. Foster*, 1 Pen. (Del.) 289, 40 Atl. 939; *Fleener v. State*, 58 Ark. 98, 23 S. W. 1; see also *Robson v. State*, 83 Ga. 166, 9 S. E. 610; *State v. Cowan*, 74 Iowa 53, 36 N. W. 886; *Mills v. State*, 53 Neb. 263, 73 N. W. 761.

⁵⁷ *State v. Sienkiewiez*, (Del.) 55 Atl. 346; *Commonwealth v. Smith*, 129 Mass. 104; *Denton v. State*, 77

Md. 527, 26 Atl. 1022; *People v. Van Ewan*, 111 Cal. 144, 43 Pac. 520; *People v. Dorthy*, 20 App. Div. (N. Y.) 308, 46 N. Y. S. 970; *Stanley v. State*, 88 Ala. 154, 7 So. 273.

⁵⁸ *Carr v. State*, 104 Ala. 43, 16 So. 155; *Malcolmson v. State*, 25 Tex. App. 267, 8 S. W. 468.

⁵⁹ *Commonwealth v. Moore*, 166 Mass. 513, 44 N. E. 612.

⁶⁰ *People v. Van Ewan*, 111 Cal. 144, 43 Pac. 520.

⁶¹ *State v. Brooks*, 85 Iowa 366, 52 N. W. 240.

⁶² *Jackson v. State*, 76 Ga. 551.

⁶³ *State v. Woodward*, 171 Mo. 593, 71 S. W. 1015.

not to be necessary to produce a written certificate of the appointment as an officer or to show that he has given an official bond.⁶⁴ If ownership of the property is laid in a corporation the charter or certificate of incorporation need not be introduced in evidence.⁶⁵ The employer, it has been held, may give parol testimony as to the fact of agency or contract of employment and afterward he may be cross-examined as to the facts upon which he formed his conclusion.⁶⁶ But this has been disputed in some jurisdictions.⁶⁷ Evidence of usage and custom has been held to show that the money came into the custody of the accused through his employment.⁶⁸ And expert accountants may be permitted to give in evidence the result of their investigations of the accounts and the like kept by the accused in his trust capacity, where such are too voluminous to permit of an investigation of them in the court-room.⁶⁹ Testimony of expert accountants who have examined the books and papers of the office of a county treasurer as to the totals of the amounts received and paid out by him, as shown by such books and records, is competent.⁷⁰ And a summary taken by an expert from the books kept by the accused for his employer is competent to show the condition of the employer's accounts.⁷¹ Evidence of the pecuniary condition of defendant charged with embezzlement immediately prior to, and during the time the offense is alleged to have been committed, is competent.⁷² Evidence is competent which shows what disposition the accused made of the property.⁷³ Admis-

⁶⁴ *State v. Dierberger*, 90 Mo. 369, 2 S. W. 286; *State v. Findley*, 101 Mo. 217, 14 S. W. 185; see also, *State v. Mims*, 26 Minn. 183, 2 N. W. 494, 683.

⁶⁵ *Jackson v. State*, 76 Ga. 551; *Commonwealth v. Dedham*, 16 Mass. 141; see also, *Thalheim v. State*, 38 Fla. 169, 20 So. 938.

⁶⁶ *State v. Brooks*, 85 Iowa 366, 52 N. W. 240; the relation of agency or the like may be shown by circumstantial evidence; *State v. Ezzard*, 40 S. Car. 312, 18 S. E. 1025; *People v. Royce*, 106 Cal. 173, 37 Pac. 630.

⁶⁷ *People v. Bidleman*, 104 Cal. 608, 38 Pac. 502; see also, *Thalheim v. State*, 38 Fla. 169, 20 So. 938.

⁶⁸ *State v. Silva*, 130 Mo. 440, 32 S. W. 1007.

⁶⁹ *State v. Findley*, 101 Mo. 217; 14 S. W. 185; *Hollingsworth v. State*, 111 Ind. 289, 12 N. E. 490; *Willis v. State*, 134 Ala. 429, 33 So. 226; *Ritter v. State*, 70 Ark. 472, 69 S. W. 262; *Woodruff v. State*, 61 Ark. 157, 32 S. W. 102.

⁷⁰ *Hollingsworth v. State*, 111 Ind. 289, 12 N. E. 490.

⁷¹ *State v. Reinhart*, 26 Ore. 466, 38 Pac. 822.

⁷² *United States v. Camp*, 2 Idaho 215, 10 Pac. 226; see also, *Boston & Co. v. Dana*, 1 Gray (Mass.) 33; *Reeves v. State*, 96 Ala. 33, 11 So. 296.

⁷³ *State v. Brooks*, 85 Iowa 366, 52 N. W. 240; *Malcolmson v. State*, 25 Tex. App. 267, 8 S. W. 468; *People*

sions by the accused are competent against him. Thus, an admission by the accused of any material fact in support of the indictment is competent against him when the fact itself and its admission occurred before the commission of the offense charged, and neither involves any criminal intent or conduct or any acknowledgment of guilt on his part.⁷⁴ And the fact that the defendant does not reply to a letter which requests a settlement has been held in connection with the letter to be competent evidence as an admission.⁷⁵ So, upon the trial of a defendant under an indictment for embezzlement of moneys of his principal, a corporation, coming to his hands as an agent, letters found in the office recently occupied and vacated by the defendant, and in letter files kept by him, in the handwriting of the officers of such principal, and touching the matter of the agency of the defendant, such letters appearing to have been invited by other letters from the defendant, and to have been acted upon in the course of the agency, were held to be relevant upon the question of the agency of the defendant, and admissible in evidence against him.⁷⁶ Evidence may be introduced which shows a continuous series of conversions in pursuance of a conspiracy.⁷⁷ As said in one case: "The trust and confidence reposed in the accused necessarily affords the amplest opportunity to misappropriate the funds intrusted to his care, and makes it almost, if not quite, impossible to prove just when and how it was done, but the ultimate fact of embezzlement is susceptible of direct proof, and that is the act against which the statute is directed. The crime may, as in the case at bar, consist of many acts done in a series of years, and the fact at last be discovered that the employer's funds have been embezzled, and yet it be impossible for the prosecution to prove the exact time or manner of each or any separate act of conversion. In such case, if it should be compelled to elect, and rely for conviction upon any one single act, the accused, although he might be admitted guilty of embezzling large sums of money in the aggregate, would probably escape conviction. The law does not afford exemption from just and merited punishment on mere technical grounds, which do not in any way affect the guilt or innocence of the

v. Bidleman, 104 Cal. 608, 38 Pac. 502.

⁷⁴ State v. Mims, 26 Minn. 183, 2 N. W. 683; see also, State v. Carrick, 16 Nev. 120; Commonwealth v. Sawtelle, 141 Mass. 140, 5 N. E. 312.

⁷⁵ State v. Adams, 108 Mo. 208, 18 S. W. 1000.

⁷⁶ Thalheim v. State, 38 Fla. 169, 20 So. 938.

⁷⁷ Jackson v. State, 76 Ga. 551.

defendant, or the merits of the case."⁷⁸ Although the value of several pieces of property is alleged in a lump sum, the value of each piece may be proved by itself.⁷⁹ The position and duties of the servant of a club may be shown by proof of his position and duties in another society, the predecessor of the club, the servant having retained the same position and performed the same services in the club as in the old society.⁸⁰ On a trial for larceny in borrowing and converting a chattel, the owner's salesman may testify that he did not sell the chattel to defendant or charge it to him.⁸¹ If the state treasurer omits to charge himself, in the county where his office is kept, with the receipt of money, or if he denies its receipt there, this has been held to be evidence of an embezzlement in that county.⁸² As shown in the section on intent, it is held in a number of cases that the criminal intent may be shown by evidence of other like acts of embezzlement at about the same period.⁸³

§ 2970. Demand.—As a general rule no demand is necessary to support a prosecution for embezzlement, unless the statute requires a demand.⁸⁴ If an actual fraudulent conversion under such circumstances as to constitute embezzlement is otherwise shown no demand is necessary.⁸⁵ But it is the rule under some statutes that there

⁷⁸ *State v. Reinhart*, 26 Ore. 466, 38 Pac. 822.

⁷⁹ *State v. Mook*, 40 Ohio St. 588.

⁸⁰ *Grillo v. State*, 9 Ohio C. C. 394.

⁸¹ *State v. Kasper*, 5 Wash. 174, 31 Pac. 636.

⁸² *People v. McKinney*, 1 Mich. 54.

⁸³ *People v. Gray*, 66 Cal. 271, 5 Pac. 240; *People v. Van Ewan*, 111 Cal. 144, 43 Pac. 520; *Bulloch v. State*, 10 Ga. 47; *Brown v. State*, 18 Ohio St. 496; *Stanley v. State*, 88 Ala. 154, 7 So. 273; *State v. Kortgaard*, 62 Minn. 7, 64 N. W. 51; *Commonwealth v. Tuckerman*, 10 Gray (Mass.) 173; *Commonwealth v. Eastman*, 1 Cush. (Mass.) 189, and other authorities cited, § 2968.

⁸⁴ *State v. Blackley*, (N. Car.) 50 S. E. 310; *State v. Mason*, 108 Ind. 48, 8 N. E. 716; *Hollingsworth v. State*, 111 Ind. 289, 12 N. E. 490; *State v. Reynolds*, 65 N. J. L. 424,

47 Atl. 644; *Alderman v. State*, 57 Ga. 367; *Wallis v. State*, 54 Ark. 611, 16 S. W. 821; *State v. Porter*, 26 Mo. 201; *Commonwealth v. Mead*, 160 Mass. 319, 35 N. E. 1125.

⁸⁵ *Commonwealth v. Hussey*, 111 Mass. 432; *State v. New*, 22 Minn. 76. Demand held unnecessary where the embezzler absconds; *Kossakowski v. People*, 177 Ill. 563, 53 N. E. 115; *People v. Carter*, 122 Mich. 668, 81 N. W. 924; upon this subject it has been said: "It is necessary to allege and prove a demand only where the statute makes it an element of the crime. As the statute under consideration does not make a demand such an element, no demand was necessary. The crime charged was not a failure to pay over the money on demand, but simply a felonious conversion. If the defendant had thus converted the

should be a demand and refusal in order to show a conversion of the property.⁸⁶ And it has been decided that even if a demand for the property by the true owner is not necessary, yet proof of such a demand may be relevant and competent if followed by a refusal since it would tend to show a fraudulent conversion.⁸⁷ It has often been held that where property has been feloniously appropriated to the use of another, it is not necessary to show a demand.⁸⁸ Thus, it would be unnecessary to make a demand for the property when the accused admits that he has sold it.⁸⁹ And it has also been held that if the embezzler absconds so that it is impossible to make a demand, the conversion may be otherwise shown and proof of a demand is unnecessary under such circumstances.⁹⁰

§ 2971. Defenses.—As already stated, an intent to restore the money or property embezzled is generally immaterial if it has been placed by the accused beyond his control.⁹¹ Indeed, the fact that the accused intended to restore property embezzled by him,⁹² or even that the loss had been made good⁹³ does not constitute a defense to

money his crime was complete, and his response to a demand could not have absolved him; if he had not thus controverted it, he was not guilty." *Wallis v. State*, 54 Ark. 611, 16 S. W. 821.

⁸⁶ See, *State v. Pierce*, 7 Kans. App. 418, 53 Pac. 278; *Wright v. People*, 61 Ill. 382; 87 Am. St. 40, note.

⁸⁷ *Burnett v. State*, 60 N. J. L. 255, 37 Atl. 622; *State v. Reynolds*, 65 N. J. L. 424, 47 Atl. 644; *State v. Bryan*, 40 Iowa 379; *People v. Royce*, 106 Cal. 173, 37 Pac. 630, 69 Pac. 524.

⁸⁸ *State v. New*, 22 Minn. 76; *State v. Tompkins*, 32 La. Ann. 620; *Kossakowski v. People*, 177 Ill. 563, 53 N. E. 115; *United States v. Sander*, 6 McLean (U. S.) 598; *Commonwealth v. Hussey*, 111 Mass. 432.

⁸⁹ *State v. Foley*, 81 Iowa 36, 46 N. W. 746; *United States v. Adams*, 2 Dak. 305, 9 N. W. 718.

⁹⁰ *Kossakowski v. People*, 177 Ill.

563, 53 N. E. 115; *People v. Carter*, 122 Mich. 668, 81 N. W. 924.

⁹¹ *Spalding v. People*, 172 Ill. 40, 49 N. E. 993; *Harris v. State*, (Tex. Cr. App.) 34 S. W. 922; *Commonwealth v. Tenney*, 97 Mass. 50; see also, *Commonwealth v. Butterick*, 100 Mass. 1, 97 Am. Dec. 65. In some states, however, a restoration or the like may go in mitigation of the punishment.

⁹² *People v. De Lay*, 80 Cal. 52, 22 Pac. 90; *People v. Butts*, 128 Mich. 208, 87 N. W. 224; *Vives v. United States*, 34 C. C. A. 403, 92 Fed. 355.

⁹³ *Fleener v. State*, 58 Ark. 98, 23 S. W. 1; *Thalhelm v. State*, 38 Fla. 169, 20 So. 938; *Meadowcroft v. People*, 163 Ill. 56, 45 N. E. 303, 35 L. R. A. 176, 54 Am. St. 447; *State v. Tull*, 119 Mo. 421, 24 S. W. 1010; in, *Meadowcroft v. People*, 163 Ill. 56, 45 N. E. 303, it is said: "The restitution of money that has been either stolen or embezzled, or a tender or offer to return the

a criminal prosecution for the embezzlement. It is not, ordinarily a good defense to show that the agency was illegal, or the money or property was obtained by the accused to transact, or in the transaction of an unlawful business;⁹⁴ nor that the property taken was used as a decoy;⁹⁵ nor that the accused worked on a commission or percentage and was to pay over only what remained after deducting such commission or percentage, where he embezzled such remaining part.⁹⁶ But it has been held a good defense to show that he had an interest in⁹⁷ or lien upon⁹⁸ the property alleged to have been embezzled. So, of course, proper evidence is admissible on the part of the accused to rebut the evidence of the prosecution and to show the lack of any essential element or fact necessary to be established in order to support a conviction.

§ 2972. Weight and sufficiency of the evidence.—As already stated, the same rule applies in prosecutions for embezzlement as in other criminal prosecutions, that is, the state must prove beyond a

same or its equivalent to the party from whom it was stolen or embezzled, does not bar a prosecution by indictment and conviction for such a larceny or embezzlement. The effect of the tender and payment in court may be a discharge from the indebtedness for the deposit fraudulently received, so far as the depositor and his civil remedies are concerned; but the crimes having been fully consummated before indictment found, it is not within the power of the banker, or the depositor, or either of them, to compromise or take away the right of the state to insist upon a conviction for the crime committed. It is not to be presumed that in creating the offense and in providing for its punishment it was the intention of the legislature to make the criminal courts of the state collecting agencies for collecting the debts due to depositors from insolvent banks and bankers."

⁹⁴ *State v. Tumey*, 81 Ind. 559; *Woodward v. State*, 103 Ind. 127, 2 N. E. 321; *Commonwealth v. Smith*, 129 Mass. 104; *Commonwealth v. Cooper*, 130 Mass. 285; *People v. Hawkins*, 106 Mich. 479, 64 N. W. 736; *State v. O'Brien*, 94 Tenn. 79, 28 S. W. 311; *State v. Hoshor*, 26 Wash. 643, 67 Pac. 386.

⁹⁵ *Goode v. United States*, 159 U. S. 663, 16 Sup. Ct. 136; *Commonwealth v. Ryan*, 155 Mass. 523, 30 N. E. 364.

⁹⁶ *Territory v. Meyer*, 3 Ariz. 199, 24 Pac. 183; *Commonwealth v. Fisher*, 113 Ky. 491, 68 S. W. 855; *People v. Hanaw*, 107 Mich. 337, 65 N. W. 231; *Campbell v. State*, 35 Ohio St. 70; *Rex v. Hartley*, Russ. & Ry. C. C. 139; *Rex v. Carr*, Russ. & Ry. C. C. 198.

⁹⁷ *Rose v. Innis*, 35 Ill. 487, 85 Am. Dec. 373; *Commonwealth v. Butterick*, 100 Mass. 1, 97 Am. Dec. 65.

⁹⁸ *Van Etten v. State*, 24 Neb. 734, 40 N. W. 289, 1 L. R. A. 669.

reasonable doubt every essential element of the offense.⁹⁹ Thus, the evidence must establish that the employment or relation of trust existed;¹⁰⁰ and a felonious intent must be shown beyond a reasonable doubt;¹⁰¹ that is, the evidence should establish an intent to defraud beyond a reasonable doubt.¹⁰² And the evidence must not only sufficiently establish the intent to defraud the owner, but also conversion of the property to one's own use, or to the use of some other person. That is, the intention to convert must also be established.¹⁰³ The gist of embezzlement being the conversion or the breach of trust, the evidence must be sufficient to establish it.¹⁰⁴ But in many cases, as where the circumstances are sufficient to prove a wilful and unlawful conversion, an intent to convert may and usually should be inferred.¹⁰⁵ In order to warrant a conviction, however, a conversion must usually be established which the agent, under his employment had no right to make.¹⁰⁶ It must be shown that the accused was in the employ of or held a relation of trust or confidence towards the person whose property he is alleged to have wrongfully taken for his own use; and any evidence which tends to prove these facts may in

⁹⁹ See, § 2965, on burden of proof; *State v. Baldwin*, 70 Iowa 180, 30 N. W. 476.

¹⁰⁰ *Calkins v. State*, 18 Ohio St. 366, 98 Am. Dec. 121; see also, *Gri-der v. State*, 133 Ala. 188, 32 So. 254; *Bartlow v. People*, 78 N. Y. 377; *Wilbur v. Territory*, 3 Wyo. 268, 21 Pac. 698; *Rex v. Snowley*, 4 Car. & P. 390, 19 E. C. L. 436.

¹⁰¹ *State v. McDonald*, 133 N. Car. 680, 45 S. E. 582.

¹⁰² *McElroy v. People*, 202 Ill. 473, 66 N. E. 1058. But it may, of course, be inferred from circumstances. *United States v. Harper*, 33 Fed. 471; *State v. Kortgaard*, 62 Minn. 7, 64 N. W. 51.

¹⁰³ *Beaty v. State*, 82 Ind. 232; *State v. Lyon*, 45 N. J. L. 272; *People v. Page*, 116 Cal. 386, 48 Pac. 326; *People v. Hurst*, 62 Mich. 276, 28 N. W. 838; *Stallings v. State*, 29 Tex. App. 220, 15 S. W. 716; *State v. Kortgaard*, 64 Minn. 7, 54 N. W. 51; *Mulford v. People*, 139 Ill. 586, 28

N. E. 1096; *State v. Pratt*, 98 Mo. 482, 11 S. W. 977; *State v. Hopkins*, 56 Vt. 250; *State v. Trolson*, 21 Nev. 419, 32 Pac. 930.

¹⁰⁴ *Commonwealth v. Ryan*, 155 Mass. 523, 30 N. E. 364; *Commonwealth v. Moore*, 166 Mass. 513, 44 N. E. 612; *Commonwealth v. Clifford*, 96 Ky. 4, 27 S. W. 811; *People v. Johnson*, 91 Cal. 265, 27 Pac. 663; *Ennis v. State*, 3 Green (Iowa) 67.

¹⁰⁵ *Commonwealth v. Moore*, 166 Mass. 513, 44 N. E. 612; *State v. Noland*, 111 Mo. 473, 19 S. W. 715; *State v. Cunningham*, 154 Mo. 161, 55 S. W. 282; *State v. Brame*, 61 Minn. 101, 63 N. W. 250; *People v. Wadsworth*, 63 Mich. 500, 30 N. W. 99; see also, *Dotson v. State*, 51 Ark. 119, 10 S. W. 18; *People v. Jackson*, 138 Cal. 462, 71 Pac. 566.

¹⁰⁶ *State v. Hill*, 47 Neb. 456, 66 N. W. 541; *State v. Wallick*, 87 Iowa 369, 54 N. W. 246.

general be received as relevant evidence.¹⁰⁷ So where the evidence shows the relation to be that of debtor and creditor it is not sufficient, for the evidence must show that a relation of trust existed between the accused and the owner of the property.¹⁰⁸ Where the accused originally gained control of the property by trick or accident there can be no embezzlement for, as distinguished from larceny, it must appear that the accused at the time of his wrongful act was in lawful possession of the property.¹⁰⁹ But it is not always essential that the proof should show that the embezzler had physical or manual possession of the money or property, and it has been held that legal possession is all that is required.¹¹⁰ It must, however, be established by the evidence that the property alleged to have been converted was the property of the employer of the accused or was secured by him in such a way as to be capable of being embezzled.¹¹¹ And so if the evidence introduced by the prosecution is consistent with good faith on the part of the accused it may be insufficient to show such an intent to embezzle as is necessary under the statutes.¹¹² To support a conviction of the accused as a public official, the evidence must show the official character of the accused and bring the act alleged within the statute under which proceedings were brought.¹¹³ Where the charge is the embezzlement of property of a corporation, proof of the de facto existence of the corporation is generally sufficient.¹¹⁴ Evidence was held sufficient to warrant a conviction of embezzlement where it showed that the accused received certain goods to sell for the owner and failed to account for them and that he had admitted that he had sold them and intended to keep the proceeds.¹¹⁵ It has also been held that a person may be convicted on the uncorroborated

¹⁰⁷ *Stanley v. State*, 88 Ala. 154, 8 So. 273; *Thalheim v. State*, 38 Fla. 169, 20 So. 938.

¹⁰⁸ *Mulford v. People*, 139 Ill. 586, 28 N. E. 1096.

¹⁰⁹ *Commonwealth v. Barry*, 99 Mass. 428, 96 Am. Dec. 767; *Phelps v. People*, 72 N. Y. 334; *People v. Johnson*, 91 Cal. 265, 27 Pac. 663; *State v. Carrick*, 16 Nev. 120; *Commonwealth v. O'Malley*, 97 Mass. 584; *Lowenthal v. State*, 32 Ala. 589; *Fulcher v. State*, 32 Tex. Cr. App. 621, 25 S. W. 625.

¹¹⁰ *State v. Krug*, 12 Wash. 288, 41 Pac. 126.

¹¹¹ *Brady v. State*, 21 Tex. App. 659, 1 S. W. 642.

¹¹² *State v. Wallick*, 87 Iowa 369, 54 N. W. 246.

¹¹³ *State v. Mahan*, 138 Mo. 112, 39 S. W. 465; *People v. Page*, 116 Cal. 386, 48 Pac. 326; *State v. Mims*, 26 Minn. 183, 2 N. W. 494; *Robson v. State*, 83 Ga. 166, 9 S. E. 610; *Hemingway v. State*, 68 Miss. 371, 8 So. 317.

¹¹⁴ *State v. Collens*, 37 La. Ann. 607; *Thalheim v. State*, 38 Fla. 169, 20 So. 938.

¹¹⁵ *State v. Foley*, 81 Iowa 36, 46 N. W. 746.

evidence of the books kept by him for his employer and which he falsified to conceal his speculations.¹¹⁶ So, it has been held that facts showing a conversion are sufficient without showing how the accused finally disposed of the property.¹¹⁷ And proof of embezzlement by circumstantial evidence is sufficient.¹¹⁸ Proof of conversion of funds is sufficient without proof of the exact amount alleged; in other words, the exact amount is immaterial.¹¹⁹ And it is generally held that any evidence tending to show that the property was of value is sufficient in this respect to sustain a verdict of conviction.¹²⁰ Where a bailee of a note is charged with its embezzlement, it is sufficient proof of its value that, being negotiable and not due at the time of its conversion, defendant was able to sell and dispose of it for its face.¹²¹ A confession or an admission which relates to the course of action of the accused during his entire employment in a certain service is competent evidence, as it necessarily has reference to and marks all the acts and matters alleged to have been done within that period.¹²² Proof of a series of criminal acts resulting in the embezzlement of a sum of money is sufficient to sustain a finding that the aggregate amount as set out was embezzled.¹²³ A showing that money belonging to a minor was intrusted to the public administrator, and that he did not have the funds, and had not paid them to the ward or her creditors, or to his successor in office, has been held sufficient to sustain a conviction of embezzlement.¹²⁴ In a recent case it was held that there was a bailment and a sufficient conversion to authorize a conviction for embezzlement where an employer sent his employe to get some medicine, intrusting a horse to him to ride for such purpose, and the employe, instead of going for the medicine, went to another

¹¹⁶ *State v. Reinhart*, 26 Ore. 466, 38 Pac. 822.

¹¹⁷ *State v. King*, 81 Iowa 587, 47 N. W. 775.

¹¹⁸ *Epperson v. State*, 22 Tex. App. 694, 3 S. W. 789; *Fleener v. State*, 58 Ark. 98, 23 S. W. 1; *Malcolmson v. State*, 25 Tex. App. 267, 8 S. W. 468; see also, *Bullock v. State*, 10 Ga. 47, 54 Am. Dec. 369; *State v. Hasledahl*, 3 N. Dak. 36, 53 N. W. 430.

¹¹⁹ *United States v. Harper*, 33 Fed. 471; *State v. Fourchy*, 51 La. Ann. 228, 25 So. 109; *State v. Thomas*, 28 La. Ann. 827; *State v. Hunt*, (R. I.) 54 Atl. 937; *State v. Mook*, 40 Ohio

St. 588; unless for the purpose of determining the grade of the crime or fixing the punishment. *Gerard v. State*, 10 Tex. App. 690.

¹²⁰ *Walker v. State*, 117 Ala. 42, 23 So. 149; *Harris v. State*, 21 Tex. App. 478, 2 S. W. 830; *State v. Thompson*, 28 Ore. 296, 42 Pac. 1002.

¹²¹ *State v. Thompson*, 28 Ore. 296, 42 Pac. 1002.

¹²² *Commonwealth v. Sawtelle*, 141 Mass. 140, 5 N. E. 312.

¹²³ *State v. Pratt*, 98 Mo. 482, 11 S. W. 977; *Jackson v. State*, 76 Ga. 551.

¹²⁴ *State v. Laughlin*, 180 Mo. 342, 79 S. W. 401.

place, and was there found endeavoring to sell the horse.¹²⁵ In another recent case it was held that the offense of embezzlement from a national bank under the United States statute involves two general elements. First, a breach of trust or duty regarding the fund or property embezzled, which must have been lawfully in the custody or possession of the accused by virtue of his office or employment, although such possession need not have been exclusive of that of other officers, clerks, or agents; and, second, by the wrongful appropriation of such property to his own use, with intent to injure or defraud the association or others; that such intent need not necessarily have been the object or purpose with which the act was done; but it was sufficient if the natural and necessary effect of the act was to injure or defraud the bank or others, and it was wilfully and intentionally done; and that an officer of such a bank is not guilty of embezzlement, abstraction, or wilful misapplication of its funds under such statute in obtaining money from the bank for his own use by means of overdrafts or loans by bona fide arrangement with its authorized officers or committee, but he is only protected by such arrangement where it was made by those representing the bank in good faith and in the supposed interest of the bank.¹²⁶ In still another recent case the evidence showed that the defendant had come to the prosecuting witness and informed such witness that he could sell certain sacks dealt in by the witness for a certain commission, the witness to collect the price and the defendant to come back the next day for his commission. The witness shipped the sacks and the defendant went with them, sold them as his own, and appropriated the proceeds. The prosecuting witness also testified that the defendant was not in his employ and had no authority to collect the money. It was held that the defendant was not guilty of embezzlement, as the property was not intrusted to him and he never had rightful possession of it.¹²⁷

¹²⁵ *Wilson v. State*, (Tex. Cr. App.) 82 S. W. 651; see also, *Steadham v. State*, 40 Tex. Cr. App. 43, 48 S. W. 177; *Malz v. State*, 36 Tex. Cr. App. 447, 34 S. W. 267, 37 S. W. 748.

¹²⁶ *United States v. Breese*, 131 Fed. 915.

¹²⁷ *People v. Dougherty*, (Cal.) 77 Pac. 466.

CHAPTER CXLII.

FALSE PRETENSES.

Sec.	Sec.
2973. Generally.	2980. Evidence to prove the pretense.
2974. Distinguished from other offenses.	2981. Reliance on pretense.
2975. Intent.	2982. Defenses.
2976. Other crimes and transactions—Preparation.	2983. Declarations and admissions—Co-conspirators.
2977. Symbol or token.	2984. Sufficiency of evidence—Variance—Miscellaneous.
2978. The pretense.	
2979. The pretense — Whether it must be calculated to deceive.	

§ 2973. **Generally.**—Various forms of cheating were indictable offenses at common law,¹ but the old common law was defective in not covering certain forms of false pretenses, and statutes have since been passed upon the subject in England and in most of the states. These differ somewhat in their provisions, and it is therefore difficult to give a definition of the crime that will hold good in all cases. The following definition of a false pretense, however, will serve to give a general idea of the offense: “A false pretense is a false and fraudulent representation of a fact as existing or having taken place, made with knowledge of its falsity, with intent to deceive and defraud, and which is adapted to induce the person to whom it is made to part with something of value.”² It has also been said, in substance, that to warrant a conviction, the evidence must show that the accused made or exhibited to the complainant some false affirmation as to matter of existing fact, or some delusive token or device; that he did this knowingly and fraudulently; that it was done under circumstances which ordinary prudence would not avoid; and that by means of it the accused obtained value, money, goods, signature to an evidence

¹ See, 2 East P. C. 818, 823, 4 804; for other definitions see, 10 L. Blackstone Comm. 157. R. A. 302, note.

² 12 Am. & Eng. Ency. of Law

of debt, or the like, to which he was not entitled.³ In other words, as said in a recent text-book: "Four essential facts must be proved to constitute the crime of false pretense. First, the intent to defraud some particular person or people generally. Second, an actual fraud committed. Third, the false pretense, and fourth, that the fraud resulted from the employment of the false pretense."⁴

§ 2974. *Distinguished from other offenses.*—Forgery is, in a sense, a false pretense, but false pretense does not necessarily involve a forgery. So, counterfeiting involves a false pretense, but a false pretense is not confined to counterfeiting. It is sometimes very difficult to distinguish between larceny and false pretense, but in larceny, although by fraud or trick, there is generally a preconceived design on the part of the taker to steal it and the property is not delivered with the intention of parting with it altogether, that is, the owner may deliver possession, but the fraud vitiates the apparent consent and he does not intentionally part with the title as well as the possession, while if he intended to part with the entire property, ownership and title as well as possession, the offense is generally that of obtaining the property by false pretenses. This distinction is fully considered in the chapter on larceny.⁵

§ 2975. *Intent.*—An intent on the part of the defendant to defraud is an essential element, sometimes said to be the gist of the offense, and the burden is on the state to establish it beyond a reasonable doubt.⁶ As a general rule, all the relevant circumstances at the

³1 Abbott L. Dict. 479; but see section considering the question as to whether it must be calculated to deceive a prudent person, post, § 2979. See also, as the elements of the offense and what must be shown in general, 25 Am. St. 378, 389, note, and, 10 L. R. A. 302 note; see also, *State v. Clark*, 46 Kans. 65, 26 Pac. 481; *People v. Wakely*, 62 Mich. 297, 28 N. W. 871; *State v. Wilbourne*, 87 N. Car. 529.

⁴*Underhill Cr. Ev.*, § 436, citing, *Commonwealth v. Drew*, 19 Pick. (Mass.) 179; *State v. Clark*, 46 Kans. 65, 66, 26 Pac. 481; *People v. Jordan*, 66 Cal. 10, 12, 4 Pac. 773;

People v. Wakely, 62 Mich. 297, 28 N. W. 871.

⁵See also, *Commonwealth v. Barry*, 124 Mass. 325; *Zink v. People*, 77 N. Y. 114; *Loomis v. People*, 67 N. Y. 322, 327; *Smith v. People*, 53 N. Y. 111; *Miller v. Commonwealth*, 78 Ky. 15; *State v. Anderson*, 47 Iowa 142; *Grunson v. State*, 89 Ind. 533, 46 Am. R. 178; *People v. Martin*, 102 Cal. 558, 36 Pac. 952; *Reg. v. Russett*, (1892) 2 Q. B. 312, 314; 2 Russell Crimes (9th Am. ed.) 200; and, 10 L. R. A. 302, 308, note, 25 Am. St. 391, note.

⁶*Edwards v. State*, (Fla.) 33 So. 853; *State v. Metsch*, 37 Kans. 222,

time of, and accompanying or surrounding the transaction in question, are proper to be shown in evidence,⁷ and considerable latitude is generally allowed in the introduction of evidence upon this question.⁸ The intent of the prosecuting witness to part with the title to his property is also frequently important.⁹ It is generally held that the fraudulent intent of the defendant may be inferred from the falsity of the pretenses and the attendant circumstances,¹⁰ but the fact that it may be inferred by the jury does not render incompetent other proper evidence tending to show it.¹¹ The judgment roll in an action in which the defendant's title was adjudged invalid has been held admissible, in connection with other evidence, to show his knowledge and guilty intent in selling the property thereafter.¹² Evidence

15 Pac. 251; *Dorsey v. State*, 111 Ala. 40, 20 So. 629; *State v. Dennis*, 80 Mo. 589; *State v. Myers*, 82 Mo. 558, 52 Am. Dec. 389; *People v. Baker*, 96 N. Y. 340, 343; *State v. Garriss*, 98 N. Car. 733, 4 S. E. 633; *Sharp v. State*, 53 N. J. L. 511, 21 Atl. 1026; *Popinaux v. State*, 12 Tex. App. 140; *Hornbeck v. State*, 10 Tex. App. 408; *Porter v. State*, 23 Tex. App. 295, 4 S. W. 889; see also, *State v. Fields*, 118 Ind. 491, 21 N. E. 252; *Commonwealth v. Jeffries*, 7 Allen (Mass.) 548, 83 Am. Dec. 712; *State v. Oakley*, 103 N. Car. 408, 9 S. E. 575.

⁷ *People v. Gibbs*, 98 Cal. 661, 23 Pac. 630; *State v. Miller*, 49 Mo. 505; *State v. Moats*, 108 Iowa 13, 78 N. W. 701; *State v. Jamison*, 74 Iowa 613, 38 N. W. 509.

⁸ *Trogon v. Commonwealth*, 31 Gratt. (Va.) 862; *McGee v. State*, 117 Ala. 229, 23 So. 797; *State v. Garriss*, 98 N. Car. 733, 4 S. E. 633; *People v. Baker*, 96 N. Y. 340, 348; *Commonwealth v. Jeffries*, 7 Allen (Mass.) 568, 83 Am. Dec. 712; *Commonwealth v. Stone*, 4 Metc. (Mass.) 43; see also, *Britt v. State*, 9 Humph. (Tenn.) 31; *Long v. State*, 1 Swan (Tenn.) 287; *White v. State*,

86 Ala. 69, 5 So. 674; *Newberry v. State*, (Tex. Cr. App.) 22 S. W. 1041.

⁹ *State v. Anderson*, 47 Iowa 142; *Loomis v. People*, 67 N. Y. 322, 23 Am. R. 123. And he may testify as to his intention. *Commonwealth v. Drew*, 153 Mass. 588, 27 N. E. 593. Or he may detail the *res gestae*. *Commonwealth v. Schwartz*, 92 Ky. 510, 18 S. W. 775.

¹⁰ *Mack v. State*, 63 Ala. 138, 140; *People v. Baker*, 96 N. Y. 340; *State v. Neimeier*, 66 Iowa 634, 24 N. W. 247; *State v. Haines*, 23 S. Car. 173; *People v. Herrick*, 13 Wend. (N. Y.) 87; *Strong v. State*, 86 Ind. 208; *State v. Garriss*, 98 N. Car. 733, 4 S. E. 633; *State v. Walton*, 114 N. Car. 783, 18 S. E. 945.

¹¹ *State v. Myers*, 82 Mo. 558, 52 Am. R. 389; *Trogon v. Commonwealth*, 3 Gratt. (Va.) 862. It is generally a question for the jury. *State v. Norton*, 76 Mo. 180; *Dorsey v. State*, 111 Ala. 38, 40, 20 So. 629; *Brown v. People*, 16 Hun (N. Y.) 535; *Woodruff v. State*, 61 Ark. 157, 179, 32 S. W. 102; *Reg. v. Cooper*, 2 Q. B. Div. 510, 46 L. J. M. C. 219.

¹² *People v. Hamberg*, 84 Cal. 468, 24 Pac. 298.

that he was hopelessly insolvent has also been held admissible for the same purpose,¹³ and schedules made by him in bankruptcy have been held admissible in such cases.¹⁴ So, the disposition made by the defendant of goods obtained by false pretense may be admissible to show his intent.¹⁵

§ 2976. Other crimes and transactions—Preparation.—Evidence of similar offenses, involving the making of other false representations within reasonable limits as to time and circumstances, whether before or after the time in question and whether to the same person or to others, is admissible against the defendant to show that he was aware of the falsity of the statements made by him in the instance in question, and that, knowing them to be false, he made them with the intent to deceive.¹⁶ Evidence of similar false pretenses has been said to be particularly relevant when it appears that the fraudulent act for which the accused is on trial does not stand alone, but is a part of a scheme, not merely to defraud one individual, but to swindle the community at large.¹⁷ Thus, where the defendant was charged with

¹³ *Commonwealth v. Jeffries*, 7 Allen (Mass.) 548, 83 Am. Dec. 712.

¹⁴ *Commonwealth v. Drew*, 153 Mass. 588, 27 N. E. 593; *Abbott v. People*, 75 N. Y. 602; see also, *Smith v. State*, 55 Miss. 514; but compare, *State v. Long*, 103 Ind. 481, 3 N. E. 169.

¹⁵ *State v. Lichliter*, 95 Mo. 402, 8 S. W. 720; see also, as to disposition of all his other property, *State v. Call*, 48 N. H. 126; see also, *State v. Luxton*, 65 N. J. L. 605, 48 Atl. 535, affirming 46 Atl. 1101.

¹⁶ *People v. Wakely*, 62 Mich. 297, 28 N. W. 871; *People v. Henssler*, 48 Mich. 49, 11 N. W. 804; *People v. Summers*, 115 Mich. 537, 73 N. W. 818; *Hutcherson v. State*, (Tex. Cr. App.) 35 S. W. 375; *Martin v. State*, 36 Tex. Cr. App. 125, 35 S. W. 976; *State v. Walton*, 114 N. Car. 783, 18 S. E. 945; *Trogon v. Commonwealth*, 31 Gratt. (Va.) 862, 863; *State v. Myers*, 82 Mo. 558, 52 Am. R. 389; *State v. Jackson*, 112 Mo.

585, 589, 20 S. W. 674; *State v. Rosenberg*, 162 Mo. 358, 62 S. W. 435, 982; *Commonwealth v. Eastman*, 1 Cush. (Mass.) 189; *Commonwealth v. Jeffries*, 7 Allen (Mass.) 548, 83 Am. Dec. 712; *Commonwealth v. Blood*, 141 Mass. 571, 575, 6 N. E. 769; *State v. Lapage*, 57 N. H. 245; *Bielschofsky v. People*, 3 Hun (N. Y.) 40; *Mayer v. People*, 80 N. Y. 364; dissenting opinion, *Strong v. State*, 86 Ind. 208; *State v. Long*, 103 Ind. 481, 3 N. E. 169; *Reg. v. Ollis* (1900), 2 Q. B. 758; *Reg. v. Francis*, 12 Cox Cr. Cas. 612; but see, *State v. Bokien*, 14 Wash. 403, 44 Pac. 889; *People v. Garrahan*, 19 App. Div. (N. Y.) 347, 46 N. Y. S. 497.

¹⁷ *Underhill Cr. Ev.*, § 438; *Rafferty v. State*, 91 Tenn. 655, 666, 16 S. W. 728; *Carnell v. State*, 85 (Md.) 36 Atl. 117; *Commonwealth v. Howe*, 132 Mass. 250, 260; *Commonwealth v. Coe*, 115 Mass. 481; *People v. Henssler*, 48 Mich. 49, 11 N. W.

falsely pretending that a forged certificate of stock was genuine, evidence of the possession and use of other forged certificates of stock by him, at about the same time, whether before or afterwards, was held admissible on the question of guilty knowledge and intent.¹⁸ So evidence that the defendant has drawn other drafts of the same kind as the one charged on the same firm, with which he falsely pretended to have credit, and that they had not been paid, has been held admissible to show that he had no credit with such firm, and therefore knew that his draft on such firm would not be paid.¹⁹ So, in another case, evidence tending to show that defendant, by his long experience in the business of handling and selling horses, knew that the horse sold was not of the character or in the condition represented by him was held competent and admissible.²⁰ In still another case, where the defendant was charged with obtaining money by false pretenses on a railway train, evidence to show the system on which similar operations had been conducted by defendant and his accomplices for some days previous and up to the time in question was held admissible upon the question of intent.²¹ And evidence showing preparation and preliminary step taken by the defendant is generally admissible for the same purpose.²²

§ 2977. Symbol or token.—In some of the statutes, the term “false token or symbol” is used in defining the means of obtaining the property, and the use of this phrase has given rise to some controversy. It is said that, “Any token or symbol of a character possessing larceny, subtlety, or generality of operation likely to affect all within its range is a public token or symbol at common law.”²³ The

804; *Strong v. State*, 86 Ind. 208, 217; *Commonwealth v. Blood*, 141 Mass. 571, 576, 6 N. E. 769; but independent acts unconnected with the crime in question were rejected in, *Todd v. State*, 31 Ind. 514; *Commonwealth v. Jackson*, 132 Mass. 16, and the transactions must not be too remote; *State v. Church*, 43 Conn. 471; *Mayer v. People*, 80 N. Y. 364; *Trogon v. Commonwealth*, 31 Gratt. (Va.) 862; see also, *State v. Wilson*, 72 Minn. 522, 75 N. W. 715. And not, it has been held, subsequent to the indictment; *State v. Letourneau*, 41 R. I. 3, 51 Atl. 1048.

¹⁸ *Commonwealth v. Coe*, 115 Mass. 481.

¹⁹ *People v. Wasservogle*, 77 Cal. 173, 19 Pac. 270.

²⁰ *Jackson v. People*, 126 Ill. 139, 18 N. E. 286.

²¹ *State v. Beaucleigh*, 92 Mo. 490, 4 S. W. 666; see also, the somewhat similar case of, *Grunson v. State*, 89 Ind. 533, where the accused was convicted of larceny.

²² *State v. Montgomery*, 56 Iowa 195, 9 N. W. 120; *People v. Winslow*, 39 Mich. 505.

²³ 12 Ency. of Law (2d ed.) 808; compare, *State v. Patillo*, 4 Hawks

use of a false token was essential to constitute a cheat of a private nature under the old English statute against obtaining property by cheats effected by privy tokens.²⁴ Something real and visible was required as distinguished from the mere words, as a ring, a key, or a writing or the like; and it seems that even a writing would not suffice unless it was in the name of another, and of such a character as to afford more credit than the mere representation or assertion of the party defrauding.²⁵ And under a statute at one time in force in Indiana, somewhat different from the statute now in force, it was held that the false use of a genuine writing was not the use of a false token or writing.²⁶ But, under most statutes the false pretense may be either in words or in acts, or in both.²⁷

§ 2978. The pretense.—The false pretense is an essential element of the offense, and it must relate to an existing or past fact, and not merely to a future event.²⁸ So, it must amount to more than the mere expression of an opinion.²⁹ Thus, a mere promise or statement

(N. Car.) 348, and *State v. Grooms*, 5 Strobb. L. (S. Car.) 158, and see, 2 Bishop New Cr. Law, §§ 151, 152.

* See, *People v. Johnson*, 12 Johns. (N. Y.) 292; *State v. Phifer*, 65 N. Car. 321; *State v. Vanderbilt*, 27 N. J. L. 328.

* See, *Rex v. Lara*, 6 Term R. 365, 2 East P. C. 827; 3 Chitty Cr. Law 997; *People v. Gates*, 13 Wend. (N. Y.) 311 (somewhat extending the rule under the English statute).

* *Shaffer v. State*, 82 Ind. 221; but compare, *Jones v. State*, 50 Ind. 473; *Wagoner v. State*, 90 Ind. 504, 507; *Lefler v. State*, 153 Ind. 82, 54 N. E. 439; in, *State v. Henn*, 39 Minn. 464, 40 N. W. 564, it is held that if the false token is a writing it need not be such as, if genuine, would be of legal validity. For examples of false tokens, see, 10 L. R. A. 304, note.

* *State v. Dowe*, 27 Iowa 273, 1 Am. R. 271; *State v. Grant*, 86 Iowa 216, 222, 53 N. W. 120; *Musgrave v. State*, 133 Ind. 297, 32 N. E. 885;

State v. Dixon, 101 N. Car. 741-743, 7 S. E. 870; *Commonwealth v. Wallace*, 114 Pa. St. 405, 412, 6 Atl. 685, 60 Am. R. 353; *Blum v. State*, 20 Tex. App. 578, 592, 54 Am. R. 530; see also, *Greenough, In re*, 31 Vt. 290; *Reg. v. Murphy*, 10 Ir. C. L. R. 508, 13 Cox Cr. Cas. 298; *Rex v. Barnard*, 7 Car. & P. 784, 32 E. C. L. 736; *Rex v. Story*, Russ. & Ry. C. C. 80; 25 Am. St. 379, note.

* *State v. Whidbee*, 124 N. Car. 796, 32 S. E. 318; *State v. Matthews*, 121 N. Car. 604, 28 S. E. 469; *State v. Magee*, 11 Ind. 154; *Redmond v. State*, 35 Ohio St. 83; *McKenzie v. State*, 11 Ark. 594; *People v. Blanchard*, 90 N. Y. 314; *State v. Kingsley*, 108 Mo. 135, 18 S. W. 994; *Commonwealth v. Warren*, 94 Ky. 615, 23 S. W. 193.

* *Woodbury v. State*, 69 Ala. 242, 44 Am. R. 515; *State v. Dowe*, 27 Iowa 275, 1 Am. R. 271; *State v. Webb*, 26 Iowa 262; *People v. Jacobs*, 35 Mich. 36.

of intention as to the future is usually insufficient to constitute a false pretense within the meaning of the law,³⁰ and expressions of opinion as to the desirability or value of a thing are not, ordinarily, sufficient to constitute false pretenses.³¹ But under a statute against fraudulently obtaining goods under false color or pretense of carrying on business and dealing in the ordinary course of trade, a false and fraudulent representation by the purchaser that he wants them for resale in the ordinary course of business has been held to be a representation of fact within the statute rather than a mere promise or expression of intention as to the future.³² And although a false pretense is coupled with a promise, if the former is relied on and is an inducing cause it is generally sufficient.³³ The pretense must be false, and it is for the jury to determine whether the representation is false,³⁴ and, in certain cases, whether it is a continuing one.³⁵ The pretense may consist in acts and conduct³⁶ as well as in words, and

³⁰ *Reg. v. Johnson*, 2 Moo. C. C. 254; *Glackan v. Commonwealth*, 3 Mets. (Ky.) 232; *Commonwealth v. Burdick*, 2 Pa. St. 163, 44 Am. Dec. 186; *Reg. v. Woodman*, 14 Cox Cr. Cas. 179; *State v. De Lay*, 93 Mo. 98, 5 S. W. 607.

³¹ *Commonwealth v. Wood*, 142 Mass. 459, 8 N. E. 432; *Commonwealth v. Stevenson*, 127 Mass. 446, 448; *State v. Daniel*, 114 N. Car. 823, 19 S. E. 100; *Rothschild v. State*, 13 Lea (Tenn.) 294, 300; *People v. Gibbs*, 98 Cal. 661, 33 Pac. 630; but compare, *People v. Jordan*, 66 Cal. 10, 4 Pac. 773, 56 Am. R. 73; *People v. Peckens*, 153 N. Y. 576, 47 N. E. 883.

³² *Commonwealth v. Walker*, 108 Mass. 309, 312; see also, *Commonwealth v. Drew*, 153 Mass. 588, 593, 27 N. E. 593.

³³ *Commonwealth v. Murphy*, 96 Ky. 28, 27 S. W. 859; *People v. Winslow*, 39 Mich. 507; *Reg. v. Bates*, 3 Cox Cr. Cas. 201; *Rex v. Asterley*, 7 Car. & P. 191, 32 E. C. L. 490; see also, *State v. Gordon*, 56 Kans. 64,

67, 42 Pac. 346; *Donohoe v. State*, 59 Ark. 377, 27 S. W. 226; *Thomas v. State*, 90 Ga. 437, 16 S. E. 94; *Commonwealth v. Wallace*, 114 Pa. St. 413, 6 Atl. 685, 60 Am. R. 353; *Boscaw v. State*, 33 Tex. Cr. App. 390, 26 S. W. 625. But not, it seems, where the entire reliance is on the promise. *People v. Tompkins*, 1 Park. Cr. Cas. (N. Y.) 238; *Ranney v. People*, 22 N. Y. 413.

³⁴ See, *Jackson v. People*, 18 Ill. App. 513; *People v. Reynolds*, 71 Mich. 348, 38 N. W. 923; *State v. Hurley*, 58 Kans. 668; *People v. Cole*, 65 Hun (N. Y.) 624, 20 N. Y. S. 505, aff'd in, 137 N. Y. 530, 33 N. E. 336.

³⁵ *Reg. v. Martin*, L. R., 1 C. C. 56, 10 Cox Cr. Cas. 383; see also, *Rothschild v. State*, 13 Lea (Tenn.) 294.

³⁶ *Musgrave v. State*, 133 Ind. 297, 32 N. E. 885; *State v. Grant*, 86 Iowa 222, 53 N. W. 120; *Commonwealth v. Wallace*, 114 Pa. St. 412, 6 Atl. 685, 60 Am. R. 353; *Rex v. Story*, Russ. & Ry. C. C. 80; *Reg. v. Bull*, 13 Cox Cr. Cas. 608.

it may be made to the agent of the defrauded party,³⁷ or, in some cases, even by advertisement.³⁸

§ 2979. The pretense—Whether it must be calculated to deceive. It is usually said that the pretense must be such as is calculated to deceive,³⁹ and it is laid down by some of the courts and text-writers that it must be such as is calculated to deceive persons of ordinary prudence and discretion, or as would have been guarded against by such persons.⁴⁰ But the better rule seems to be that this is not an absolute requisite and that it is sufficient, in this respect, if it was calculated to and did impose upon and deceive the person to whom it was made. Thus, in a recent case, overruling several earlier decisions in the same jurisdiction, it is said: "In England, and many of the states, the rule is that any pretense which deceives the person defrauded is sufficient to sustain an indictment, although it would not have deceived a person of ordinary prudence."⁴¹

³⁷ *State v. Turley*, 142 Mo. 403, 44 S. W. 267; *Perry v. State*, (Tex. Cr. App.) 46 S. W. 816; *Commonwealth v. Call*, 21 Pick. (Mass.) 509, 523, 32 Am. Dec. 284, 324; *Reg. v. Godfrey*, 7 Cox Cr. Cas. 392; *Reg. v. Dent*, 1 Car. & Kir. 249, 47 E. C. L. 349.

³⁸ *Jackson v. People*, 126 Ill. 139, 18 N. E. 286; *State v. Sarony*, 95 Mo. 349, 8 S. W. 407; *Reg. v. Cooper*, 1 Q. B. Div. 19, 13 Cox Cr. Cas. 123.

³⁹ *Meek v. State*, 117 Ala. 116, 23 So. 155; *Watson v. People*, 87 N. Y. 561, 566; *Bowen v. State*, 9 Baxt. (Tenn.) 45, 40 Am. R. 71; *Canter v. State*, 7 Lea (Tenn.) 349; *State v. Estes*, 46 Me. 150; *Higler v. People*, 44 Mich. 299, 6 N. W. 664; *Commonwealth v. Moore*, 99 Pa. St. 570.

⁴⁰ *Commonwealth v. Grady*, 13 Bush (Ky.) 285, 26 Am. R. 192; *Commonwealth v. Haughey*, 3 Metc. (Ky.) 223; *People v. Williams*, 4 Hill (N. Y.) 9, 40 Am. Dec. 258; *State v. Young*, 76 N. Car. 258; *State v. Simpson*, 3 Hawks (10 N. Car.) 620; *Underhill Cr. Ev.*, § 440.

Several Indiana cases to the same effect are overruled in the decision referred to in the next note.

⁴¹ *Lefler v. State*, 153 Ind. 82, 83, 54 N. E. 439; 2 Russell Crimes (9th Am. ed.) 619-700; *Roscoe Cr. Ev.* (7 Am. ed.) 487, 488; 2 *Bishop Cr. Law*, § 433-436; *Reg. v. Woolley*, 1 Den. C. C. 559, 4 Cox Cr. Cas. 193, 3 Car. & Kir. 98, 2 East P. C., § 8, pp. 827, 831; *Reg. v. Jessop*, *Dears & B.* 442, 7 Cox Cr. Cas. 399; *Reg. v. Giles, L. & C.* 502, 10 Cox Cr. Cas. 44; *Johnson v. State*, 36 Ark. 242; *State v. Fooks*, 65 Iowa 196, 452, 21 N. W. 561, 773; *State v. Montgomery*, 56 Iowa 195, 9 N. W. 120; *People v. Pray*, 1 Mich. N. P. 69; *State v. Williams*, 12 Mo. App. 415; *Colbert v. State*, 1 Tex. App. 314; *Greenough, In re*, 31 Vt. 279-290; *Watson v. People*, 87 N. Y. 561, 41 Am. R. 397; *People v. Oyer & Terminer*, 83 N. Y. 436-449; *People v. Cole*, 65 Hun (N. Y.) 624, 20 N. Y. S. 505, *aff'd in*, 137 N. Y. 530, 33 N. E. 336; *People v. Rice*, 128 N. Y. 649, 29 N. E. 146; *State v. Mills*, 17 Me. 211;

§ 2980. **Evidence to prove the pretense.**—Unless otherwise provided by statute⁴² the false pretense may be proved in the same manner as any other fact in similar cases. The burden is upon the prosecution to show its falsity;⁴³ but this may be done by circumstantial evidence.⁴⁴ Admissions of the defendant are competent for this purpose.⁴⁵ If the false pretense is in writing the writing is usually the best evidence, but if it is lost, or there is other ground for the admission of secondary evidence, such evidence is admissible after laying the proper foundation.⁴⁶ And it has been held that the mere fact that there is a writing, embodying some of the false representations, will not exclude parol evidence of other oral representations not contained therein.⁴⁷ Illustrative cases showing the extent to which the courts go in admitting evidence to show the falsity of the pretense are cited below.⁴⁸ The defendant may, in general, introduce

Smith v. State, 55 Miss. 513; Watson v. State, 16 Lea (Tenn.) 604; Bowen v. State, 9 Baxt. (Tenn.) 45, 40 Am. R. 71; Commonwealth v. Henry, 22 Pa. St. 253; Thomas v. People, 113 Ill. 531; Cowen v. People, 14 Ill. 348; Bartlett v. State, 28 Ohio St. 669, 670; see also, 16 Am. L. Reg. (N. S.) 321, 325; 25 Am. St. 380, note.

⁴² See as to California statute, People v. Martin, 102 Cal. 558, 36 Pac. 952.

⁴³ People v. Hong Quin Moon, 92 Cal. 41, 27 Pac. 1096; Babcock v. People, 15 Hun (N. Y.) 347; Morris v. People, 4 Colo. App. 136, 35 Pac. 188; Bowler v. State, 41 Miss. 570, 576; Brown v. State, 29 Tex. 503; but see, Reg. v. Sampson, 49 J. P. 807, 52 L. T. N. S. 772.

⁴⁴ Commonwealth v. Hershell, Thach. Cr. Cas. (Mass.) 70; People v. Pinckney, 67 Hun (N. Y.) 428, 22 N. Y. S. 118; People v. Sully, 5 Park. Cr. Cas. (N. Y.) 142, 169; Smith v. State, 55 Miss. 521; State v. Hulder, 78 Minn. 524, 81 N. W. 532.

⁴⁵ State v. Lewis, 45 Iowa 20; State v. Gordon, 56 Kans. 64, 42 Pac. 346;

Maddox v. State, 41 Tex. 205, 208; but see as to corroboration, State v. Penny, 70 Iowa 190, 30 N. W. 561; see also, Sherman v. People, 13 Hun (N. Y.) 575.

⁴⁶ Commonwealth v. Jeffries, 7 Allen (Mass.) 561, 83 Am. Dec. 712; Rex v. Chadwick, 6 Car. & P. 181, 25 E. C. L. 244; see also, State v. Penny, 70 Iowa 191, 30 N. W. 561, (holding that no sufficient foundation had been laid).

⁴⁷ Reg. v. Adamson, 1 Car. & Kir. 192, 47 E. C. L. 192; see also, Jackson v. People, 126 Ill. 139, 18 N. E. 286; Commonwealth v. Alsop, 1 Brews. (Pa.) 328, 331; for letters and other documents held admissible see, Territory v. Ely, 6 Dak. 128, 50 N. W. 623; Rafferty v. State, 91 Tenn. 655, 16 S. W. 728; Jackson v. People, 126 Ill. 139, 18 N. E. 286; Commonwealth v. Blood, 141 Mass. 571, 6 N. E. 769; Trogon v. Commonwealth, 31 Gratt. (Va.) 862, 869; but compare, Jones v. State, 8 Tex. App. 648, 652.

⁴⁸ Commonwealth v. Lundberg, 18 Phila. (Pa.) 482; Abbott v. People, 15 Hun (N. Y.) 437; People v. Wieger, 100 Cal. 357, 34 Pac. 826;

any proper evidence to show that he did not make the alleged false representation, or that it is true.⁴⁹ It is essential, as a rule at least, that the defendant should have known of the falsity of the pretense,⁵⁰ but this, too may be shown by circumstantial evidence, and the defendant's admissions or declarations either before or after the offense are usually competent for this purpose.⁵¹ Indeed, it is sometimes said that knowledge of the false pretense will be presumed under certain circumstances. In a recent case, on a trial for obtaining goods under false pretenses, a paper taken from defendant's person was held admissible in evidence both for the purpose of showing guilty knowledge and for the purpose of showing that the defendant had devised a scheme to obtain goods whenever and from whomsoever he could, where the paper was in his own handwriting, and was addressed "to all whom it may concern," and contained the same false statements he was charged with in the indictment, though it was not used in obtaining the goods in the particular case, and was dated subsequent thereto.⁵²

§ 2981. Reliance on pretense.—The false pretense alleged must have been relied on by the defrauded party and must have been an

Jordan v. Osgood, 109 Mass. 457, 464, 12 Am. R. 731; *Smith v. People*, 47 N. Y. 303.

⁴⁹ See, *Rainforth v. People*, 61 Ill. 365; *State v. Lurch*, 12 Ore. 95, 6 Pac. 405.

⁵⁰ *People v. Behee*, 90 Mich. 356, 51 N. W. 515; *Johnson v. State*, 75 Ind. 553, 556; *State v. Bradley*, 68 Mo. 140, 142; *Sharp v. State*, 53 N. J. L. 511, 21 Atl. 1026; *State v. Hurst*, 11 W. Va. 54, 59. It has been held no offense where it appeared that the defendant in good faith believed the representation true. *State v. Alphin*, 84 N. Car. 745; *Ketchell v. State*, 36 Neb. 324, 54 N. W. 564.

⁵¹ *Fowler v. People*, 18 How. Pr. (N. Y.) 493, 499; *State v. Long*, 103 Ind. 481, 3 N. E. 169; see also, *People v. Hamberg*, 84 Cal. 468, 473, 24 Pac. 298; *People v. Pinckney*, 67 Hun (N. Y.) 428, 22 N. Y. S. 118.

⁵² *State v. Haines*, 23 S. Car. 170; *Jackson v. People*, 126 Ill. 139, 18 N. E. 286; *Pinter, In re*, 66 L. T. N. S. 324; *Carnell v. State*, 85 Md. 1, 36 Atl. 117. In the course of the opinion the court said: "The representation made in the letter, being, according to its purport, subsequent in date to a similar statement set forth in the bill of particulars, may not prove that the latter was in fact made; yet the letter was admissible for the purpose of showing guilty knowledge. * * * But, in addition to this, the letter was admissible under the exception to the general rule which is well recognized, namely, for the purpose of showing that the traverser had devised a scheme to obtain goods wherever and from whomsoever he could by falsely representing that he had money on deposit in the People's Bank of Hagerstown."

inducing cause of his parting with his property.⁵³ The evidence, it has been said must show beyond a reasonable doubt that he believed that the representations were true, and that, relying and acting upon them, he parted with his property upon the faith of such representations.⁵⁴ But they need not be shown to have been the sole, and exclusive cause or inducement. He may have been influenced by consideration of friendship, or the desire of gain, or other causes as well as the false pretenses and whether he was so influenced, and by what and to what extent, are questions for the jury.⁵⁵ It has been held that the prosecuting witness may testify directly that he believed in the false pretenses;⁵⁶ but even though he does not testify upon the subject,⁵⁷ it may be inferred from the circumstances in evidence that he was induced to part with his property by the false pretenses of the defendant.⁵⁸

⁵³ *Meek v. State*, 117 Ala. 116, 23 So. 155; *Morgan v. State*, 42 Ark. 131, 138, 48 Am. R. 55; *State v. Connor*, 110 Ind. 469, 471, 11 N. E. 454; *Ladd v. State*, 17 Fla. 215, 219; *State v. Stone*, 75 Iowa 215, 39 N. W. 275; *State v. Moore*, 111 N. Car. 669, 672, 16 S. E. 384; *State v. Bloodsworth*, 25 Ore. 83, 34 Pac. 1023; *Bowler v. State*, 41 Miss. 570, 578; *Reg. v. Gemnell*, 26 U. C. Q. B. 312; *Reg. v. Jones*, 1 Cox Cr. Cas. 105; *Reg. v. Mills*, 7 Cox Cr. Cas. 263; *State v. Crane*, 54 Kans. 384, 38 Pac. 270; 2 Bishop New Cr. Law, § 159.

⁵⁴ *Underhill Cr. Ev.*, § 442; *Trogdon v. Commonwealth*, 31 Gratt. (Va.) 862, 884; *Reg. v. Mills*, 7 Cox Cr. Cas. 263.

⁵⁵ *State v. Thatcher*, 35 N. J. L. 445; *Therasson v. People*, 20 Hun (N. Y.) 55, 67; *Van Buren v. People*, 7 Colo. App. 136, 42 Pac. 599; *People v. Haynes*, 14 Wend. (N. Y.) 546; *People v. Baker*, 96 N. Y. 340, 348; *Berry v. State*, 97 Ga. 202, 23 S. E. 833; *Skiff v. People*, 2 Park. Cr. Cas. (N. Y.) 139; *State v. Wil-*

lams, 103 Ind. 235, 237, 2 N. E. 585; *Woodbury v. State*, 69 Ala. 242, 246; *Wax v. State*, 43 Neb. 18, 61 N. W. 117; *State v. Dunlap*, 24 Me. 77; *Commonwealth v. Stevenson*, 127 Mass. 446; *Fay v. Commonwealth*, 28 Gratt. (Va.) 912; *Cowen v. People*, 14 Ill. 348; *Britt v. State*, 9 Humph. (Tenn.) 30; *State v. Fooks*, 65 Iowa 196, 452, 21 N. W. 561, 773; *Snyder, In re*, 17 Kans. 542; *State v. Cowdin*, 28 Kans. 270; *State v. Tessier*, 32 La. Ann. 1227; *Smith v. State*, 55 Miss. 513; *People v. Gibbs*, 98 Cal. 662, 663, 33 Pac. 630; *Donohoe v. State*, 59 Ark. 375, 27 S. W. 226; but see, *Bryant v. Commonwealth*, 104, Ky. 593, 47 S. W. 578.

⁵⁶ *People v. Herrick*, 13 Wend. (N. Y.) 87; *Snyder, In re*, 17 Kans. 542.

⁵⁷ *People v. Hong Quin Moon*, 92 Cal. 42, 27 Pac. 1096; *State v. Thatcher*, 35 N. J. L. 449.

⁵⁸ *Commonwealth v. Coe*, 115 Mass. 501; *Therasson v. People*, 82 N. Y. 238; *Reg. v. Burton*, 16 Cox Cr. Cas. 62; *Jones v. United States*, 5 Cranch (U. S.) 647, 652.

§ 2982. **Defenses.**—A mere intention to repay money obtained by false pretenses, or the ability of the defendant to repay it, is not a good defense;⁵⁹ and it has been held that it is no defense that the party defrauded had himself misrepresented the value of the goods obtained by the defendant by false pretense,⁶⁰ or, in other words, that the illegal purpose of the person from whom money or property is obtained by false pretenses is no defense to an indictment against the person who so obtained it.⁶¹ But upon this last proposition the authorities are conflicting and the contrary doctrine is maintained in several apparently well considered cases.⁶² The fact that the offense was committed for a purposed meritorious object or for the benefit of another, as for instance, where parties conspired to obtain money by false pretenses from an insurance company for the benefit of the insured rather than for themselves, is no defense.⁶³ The defendant may, however, introduce proper evidence to repel or rebut the inference of an intent on his part to defraud. It has been held that he may do so by his own direct testimony,⁶⁴ or he may do so by other legitimate evidence tending to show that there was no false pretense on his part or that no fraud was designed or could have resulted.⁶⁵ So, in a complicated transaction, he may generally show the

⁵⁹ *Buntain v. State*, 15 Tex. App. 515; *Commonwealth v. Coe*, 115 Mass. 481; see also, *Territory v. Ely*, 6 Dak. 128, 50 N. W. 623; *People v. Bryant*, 119 Cal. 595, 51 Pac. 960, holding the fact that defrauded party might ultimately have recovered no defense. Nor does an offer to refund or even a restoration purge the offense. *Donohoe v. State*, 59 Ark. 378, 27 S. W. 226; *Carlisle v. State*, 77 Ala. 71; *People v. Oscar*, 105 Mich. 704, 63 N. W. 971.

⁶⁰ *Commonwealth v. Morrill*, 8 Cush. (Mass.) 571.

⁶¹ *Cummins, In re*, 16 Colo. 451, 27 Pac. 887, 13 L. R. A. 752; *Commonwealth v. Henry*, 22 Pa. 253; 2 Bishop Cr. Law (7th ed.), § 469; see also, *People v. Martin*, 102 Cal. 558, 36 Pac. 952; *People v. Watson*, 75 Mich. 582, 42 N. W. 1005; *Commonwealth v. O'Brien*, 172 Mass. 248, 52 N. E. 77; *Casily v. State*, 32 Ind. 62,

66; *Cunningham v. State*, 61 N. J. L. 67, 38 Atl. 847; *Reg. v. Hudson*, 8 Cox Cr. Cas. 305, 6 Jur. N. S. 566.

⁶² *People v. Stetson*, 4 Barb. (N. Y.) 151; *McCord v. People*, 46 N. Y. 470 (with a vigorous dissenting opinion, however, by Peckham, J.); *State v. Crowley*, 41 Wis. 271.

⁶³ *Musgrave v. State*, 133 Ind. 297, 32 N. E. 885; *People v. Lennox*, 106 Mich. 625, 64 N. W. 488; see also, *Willis v. People*, 19 Hun (N. Y.) 84; but see, *Reg. v. Garrett*, 6 Cox Cr. Cas. 260; *Commonwealth v. Langley*, 169 Mass. 89, 47 N. E. 511; *Bracey v. State*, 64 Miss. 26, 8 So. 165.

⁶⁴ *Babcock v. People*, 15 Hun (N. Y.) 347, 355.

⁶⁵ See, *People v. Getchell*, 6 Mich. 496; it is held in many jurisdictions that if the other party is merely induced by a false pretense to pay a debt or perform a duty which he

course of dealing between himself and the prosecuting witness;⁶⁶ but the evidence must be relevant and material.⁶⁷ It has also been held on the trial of an indictment for obtaining goods by false representations, where the terms of a chattel mortgage were introduced in evidence against the defendant, that parol evidence was admissible to show his relationship to the mortgage transaction and that he acted under a misapprehension.⁶⁸ So, it has been held that the defendant may introduce evidence of his character and reputation with respect to the traits involved, but not specific instances and their details;⁶⁹ and evidence of his good financial standing at the time has been held inadmissible.⁷⁰

§ 2983. Declarations and admissions—Co-conspirators.—Declarations and admissions made by the defendant, relating to the transaction charged, are admissible against him as in other cases.⁷¹ So, where the defendant, when arraigned upon an indictment for obtaining money by false pretenses that he was a man of means, obtained counsel at the expense of the state by pleading his poverty to the court, his statement thus made was held admissible to prove the falsity of the pretense made to his victim.⁷² So, too, the acts and declarations of his co-conspirator relating to the same crime, and in furtherance thereof, though not made in his presence, are admissible against

owed to the defendant this will generally negative an intent to defraud and constitute a defense. *Rex v. Williams*, 7 Car. & P. 354, 32 E. C. L. 540; *Commonwealth v. McDuffy*, 126 Mass. 467; *People v. Thomas*, 3 Hill (N. Y.) 169; *Jamison v. State*, 37 Ark. 445, 40 Am. R. 103; *State v. Hurst*, 11 W. Va. 54, 71; but see, *People v. Smith*, 5 Park. Cr. Cas. (N. Y.) 490; *Commonwealth v. Leisy*, 1 Pa. Co. Ct. R. 50.

⁶⁶ *State v. Rivers*, 58 Iowa 102, 108, 12 N. W. 117, 43 Am. R. 112; *Lutton v. State*, 14 Tex. App. 518; but see, *People v. Genung*, 11 Wend. (N. Y.) 18, 25 Am. Dec. 594, as to books of account.

⁶⁷ *State v. Wilson*, 143 Mo. 334, 44 S. W. 722; *People v. Lennox*, 106 Mich. 625, 64 N. W. 488; *Culver v.*

State, 86 Ga. 197, 12 S. E. 746; *Commonwealth v. Howe*, 132 Mass. 250; *Van Buren v. People*, 7 Colo. App. 136, 42 Pac. 599.

⁶⁸ *State v. Garriss*, 98 N. Car. 733, 4 S. E. 633.

⁶⁹ *State v. Dexter*, 115 Iowa 678, 87 N. W. 417; see also, *State v. Penley*, 27 Conn. 587.

⁷⁰ *State v. Penley*, 27 Conn. 587; but see post, § 2984.

⁷¹ *State v. Long*, 103 Ind. 481, 3 N. E. 169; *Commonwealth v. Castles*, 9 Gray (Mass.) 121, 69 Am. Dec. 278; *State v. Wilkerson*, 72 N. Car. 376; see also, *State v. Wilson*, 72 Minn. 522, 75 N. W. 715; *People v. Shelters*, 99 Mich. 333, 58 N. W. 362.

⁷² *State v. Fooks*, 65 Iowa 196, 452, 21 N. W. 561, 773.

him.⁷³ It is held, however, that such evidence is not sufficient to convict, unless corroborated,⁷⁴ and to admit the acts and declarations of those claimed to be co-conspirators the fact of combination or conspiracy should be shown.⁷⁵

§ 2984. Sufficiency of evidence—Variance—Miscellaneous.—The evidence must establish a false representation or pretense substantially as charged in the indictment.⁷⁶ But, although the defendant is charged with making a number of false pretenses in accomplishing the one fraudulent purpose, it is not necessary that all of them should be proved.⁷⁷ So, if the substance of the false representation is proved, it is not a fatal variance that it is not proved in the exact words.⁷⁸ But a substantial variance in this respect or in any other material respect may be fatal.⁷⁹ The place where the owner parts with his property and the crime is consummated generally determines the venue. This is an important matter in many cases, as where the accused has written to the owner of property in another jurisdiction and it is sent to the former upon the faith of the false representations

⁷³ *State v. Montgomery*, 56 Iowa 195, 9 N. W. 120; see also, *State v. Davis*, 56 Iowa 202, 9 N. W. 123; *Commonwealth v. Clancy*, (Mass.) 72 N. E. 842.

⁷⁴ *State v. Penny*, 70 Iowa 190, 30 N. W. 561.

⁷⁵ *Jones v. Commonwealth*, 2 Duv. (Ky.) 554.

⁷⁶ *O'Connor v. State*, 30 Ala. 9; *Commonwealth v. Pierce*, 130 Mass. 31; *Commonwealth v. Davidson*, 1 Cush. (Mass.) 33; *Todd v. State*, 31 Ind. 514; *Rex v. Plestow*, 1 Campb. 494; but see, *People v. Herrick*, 13 Wend. (N. Y.) 87.

⁷⁷ *People v. Wakely*, 62 Mich. 297, 28 N. W. 871; *Todd v. State*, 31 Ind. 514; *State v. Dunlap*, 24 Me. 77; *Cowen v. People*, 14 Ill. 348; *Commonwealth v. Morrill*, 8 Cush. (Mass.) 571; *People v. Blanchard*, 90 N. Y. 314; *State v. Vorback*, 66 Mo. 168.

⁷⁸ *State v. Vanderbilt*, 27 N. J. L.

328; *Commonwealth v. Coe*, 115 Mass. 481.

⁷⁹ See, *Commonwealth v. Howe*, 132 Mass. 250; *Commonwealth v. Jeffries*, 7 Allen (Mass.) 548, 83 Am. Dec. 712; *Baker v. State*, 31 Ohio St. 314; *Prehn v. State*, 22 Neb. 673, 36 N. W. 295; *People v. Reed*, 70 Cal. 529, 11 Pac. 676; *Kirtley v. State*, 38 Ark. 543; *State v. Horn*, 93 Mo. 190, 6 S. W. 96. It must in some jurisdictions, at least, appear beyond a reasonable doubt that the property obtained by the false pretenses had some value. *State v. Lewis*, 26 Kans. 123; *Morgan v. State*, 42 Ark. 131; *State v. Shaeffer*, 89 Mo. 271; 1 S. W. 293; *Rosales v. State*, 22 Tex. App. 673, 3 S. W. 344. And that the other party was prejudiced or injured. *Snyder, In re*, 17 Kans. 542; *People v. Herrick*, 13 Wend. (N. Y.) 87; but see, *Simmons v. People*, 88 Ill. App. 334; *Commonwealth v. Harley*, 7 Metc. (Mass.) 462.

contained in the letter. It must, therefore, generally be proved where the false pretenses were acted upon and the property obtained.⁸⁰ Where one procures money or goods from another knowing that the latter believes him to be solvent and financially responsible, the insolvency of the former may well be considered as showing, with the other circumstances, an intent to defraud, and this is certainly true where he represents that he is solvent. Hence, evidence to show the solvency or insolvency of the defendant has often been admitted in prosecutions for false pretenses.⁸¹ In a recent case, which was a prosecution for larceny by obtaining money from different persons at different times by false pretenses in the sales of business establishments, there being evidence of a conspiracy in pursuance of which defendants had acted throughout the transactions, it was held that the jury, if they found there was such a conspiracy, might consider the acts of either or both of defendants in any of the transactions, at least on the question of the knowledge of each of the falsity of the representations made, and of the intent of each to cheat each purchaser by means of them; and that they might also consider the fact that the volume of business was much less immediately after the sale than it had been represented to be before the sale.⁸² In a recent case in Wisconsin it is held that the evidence must show the obtaining of the very property alleged in the indictment or information, or some part of it, but that proof of obtaining part of the money described is sufficient.⁸³ Where the defendant, in a horse trade, agreed to pay

⁸⁰ *State v. Shaeffer*, 89 Mo. 271, 278, 1 S. W. 393; *State v. House*, 55 Iowa 466, 472, 8 N. W. 307; *Norris v. State*, 25 Ohio St. 217; *Commonwealth v. Van Tuyl*, 1 Metc. (Ky.) 1; *People v. Adams*, 3 Denio (N. Y.) 190; *Commonwealth v. Karpouski*, 15 Pa. Co. Ct. R. 280; see also, *Stewart v. Jessup*, 51 Ind. 413. The printed matter at the head of the letter may be relevant as indicating the false character which the accused has assumed in order to effect his criminal designs. *Taylor v. Commonwealth*, 94 Ky. 281, 284, 22 S. W. 217.

⁸¹ *State v. Hill*, 72 Me. 238; *Wood v. People*, 53 N. Y. 511; *Brosn v. State*, (Tex.) 38 S. W. 1008; *Com-*

monwealth v. Drew, 153 Mass. 588, 27 N. E. 593; *Reg. v. Howarth*, 11 Cox Cr. Cas. 588; see also, *State v. Call*, 48 N. H. 126; *State v. Long*, 103 Ind. 481, 3 N. E. 169; *State v. Fooks*, 65 Iowa 196, 452, 21 N. W. 561, 773; *State v. McCormick*, 57 Kans. 440, 46 Pac. 777; as to how insolvency may be proved, see, *Commonwealth v. Jeffries*, 7 Allen (Mass.) 548, 83 Am. Dec. 712; *Hathcock v. State*, 88 Ga. 91, 13 S. E. 959.

⁸² *Commonwealth v. Clancy*, (Mass.) 72 N. E. 842. The court held that the latter fact was relevant upon the question of the falsity of the representations.

⁸³ *Bates v. State*, (Wis.) 103 N. W. 251; see also, *Schleisinger v. State*,

the prosecuting witness a certain sum and for that purpose handed him a confederate bill for a larger sum and asked for the change, and the prosecuting witness received the confederate bill, believing it United States currency, the defendant was held guilty under the Kentucky statute.⁸⁴ So, where the defendant, by falsely personating another, obtained a check payable to the latter, it was held that a conviction might be had under the Vermont statute.⁸⁵

11 Ohio St. 669; *Baker v. State*, 31 Ohio St. 314; *Commonwealth v. Howe*, 132 Mass. 250; *Commonwealth v. Wood*, 142 Mass. 459, 8 N. E. 432; *People v. Haynes*, 14 Wend. (N. Y.) 546, 28 Am. Dec. 530.

⁸⁴ *Commonwealth v. Beckett*, (Ky.) 84 S. W. 758. The court said that the bill was a false token and that it was immaterial whether it

was calculated to deceive ordinarily careful and prudent persons or not, as the statute was designed to protect the unwary and foolish as well as the wary and prudent.

⁸⁵ *State v. Marshall*, (Vt.) 59 Atl. 916; see also, 2 Bishop New Cr. Law 152; *Commonwealth v. Drew*, 19 Pick. (Mass.) 179.

CHAPTER CXLIII.

FORGERY.

<p>Sec. 2985. Definition — Essential elements. 2986. Presumptions. 2987. Burden of proof. 2988. Question of law or fact. 2989. Who competent to testify. 2990. Proof of intent and knowledge. 2991. Proof of handwriting. 2992. Production of forged instrument.</p>	<p>Sec. 2993. Secondary evidence of forged instrument. 2994. Other forged instruments. 2995. Evidence in general. 2996. Evidence in defense. 2997. Weight and sufficiency of evidence. 2998. Variance.</p>
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§ 2985. **Definition—Essential elements.**—Forgery may be defined as the falsely making or materially altering of a writing, with intent to defraud where such writing, if genuine, would apparently be of legal efficacy or the foundation of legal liability. In other words, it is the fraudulent making or alteration of a writing to the prejudice of another man's right.¹ The essential elements of the crime, in general, are the false making or alteration of some writing, guilty knowledge and intent, and the apparent legal efficacy of the instrument, or, in other words, its capacity or apparent capacity to effect a fraud and work injury to some one.²

§ 2986. **Presumptions.**—Among the presumptions that have been held to arise in cases of forgery are the following: A presumption arises that one forged or procured an order to be forged who has such forged order in his possession if it is drawn in his favor.³ So, it has

¹ See, *People v. Fitch*, 1 Wend. (N. Y.) 198, 19 Am. Dec. 477, where definitions by a number of jurists and writers are given. See also, *United States v. Long*, 30 Fed. 678; *State v. Rose*, 70 Minn. 403, 73 N. W. 177; *Arnold v. Cost*, 3 Gill & J. (Md.) 219, 22 Am. Dec. 302, and note; *Black L. Dict.*; note in 8 Am. Cr. 273; *Hughes Cr. L. & Proc.*, § 896, note in 10 L. R. A. 779.

² See, 22 Am. Dec. 306, note, and, 8 Am. St. 466, note.

³ *Hobbs v. State*, 75 Ala. 1; *State v. Britt*, 14 N. Car. 122.

frequently been held that a presumption or inference of guilt may arise from the unexplained possession of a forged writing by one who is a beneficiary.⁴ But if one is not necessarily the beneficiary this presumption may not arise. Thus, it is held that a presumption does not arise that one made a forged indorsement on an instrument upon proof that he had it in his possession, and uttered and published it as true, where such indorsement was the blank indorsement in the name of the payee on such instrument.⁵ But it has been held that the possession of the forged instrument, and claim of title thereunder, is evidence, and raises a presumption that the defendant was the forger.⁶ Mere proof of possession of forged paper, however, does not create or raise a conclusive presumption of a fraudulent intent.⁷ If a paper is shown to be a forgery, and has passed through the defendant's hands and he uttered it as true, there may be a presumption of knowledge on his part that it was forged.⁸ A presumption of intent may arise from the circumstances of the accused doing an act which he knows the law forbids as making a false entry to conceal a previous defalcation.⁹ It has been held that a presumption that a forgery was committed in a certain county does not necessarily arise from the fact that the instrument was uttered in that county.¹⁰ But it is generally held to be presumptive evidence,¹¹ or at least to justify the inference that the forgery was committed in that county.¹² The passing of a forged instrument does not necessarily raise the presumption that the person passing the same forged an indorsement appearing thereon.¹³ And there is no presumption of guilt from the mere fact that the party charged with a crime had the ability to commit it.¹⁴ But the fact that the seal upon an instrument is false has been held to raise a presumption that the signature is forged.¹⁵

⁴ *Barnes v. Commonwealth*, 101 Ky. 556, 41 S. W. 772; *Commonwealth v. Talbot*, 2 Allen (Mass.) 161; *Williams v. State*, 126 Ala. 50, 28 So. 632; *State v. Carter*, 129 N. Car. 560, 40 S. E. 11.

⁵ *Miller v. State*, 51 Ind. 405.

⁶ *State v. Pyscher*, 179 Mo. 140, 77 S. W. 836.

⁷ *Fox v. People*, 95 Ill. 71.

⁸ *Hagar v. State*, 71 Ga. 164.

⁹ *Phelps v. People*, 72 N. Y. 365,

⁶ *Hun (N. Y.)* 401, 428.

¹⁰ *Commonwealth v. Parmenter*, 5 Pick. (Mass.) 279.

¹¹ *State v. Poindexter*, 23 W. Va. 805.

¹² *State v. Morgan*, 2 Dev. & B. L. (N. Car.) 348; *Bland v. People*, 4 Ill. 364; *State v. Morgan*, 35 La. Ann. 293.

¹³ *Miller v. State*, 51 Ind. 405.

¹⁴ *State v. Hopkins*, 50 Vt. 316.

¹⁵ *People v. Marlon*, 29 Mich. 31.

§ 2987. Burden of proof.—The burden of proof is generally on the prosecution to establish three facts; namely, that a false writing has been made, that it was apparently capable of accomplishing a fraudulent purpose, and that there was a fraudulent intent.¹⁶ The mere fact of signing another's name does not, it has been held, raise a presumption that it was fraudulent, and when the defendant admits the making of the signature, but claims that he had authority to so sign, the burden is on the state to prove that it was without authority.¹⁷ If the indictment describes the writing with minuteness the burden of proof is on the prosecution to establish the writing somewhat strictly as pleaded in the indictment.¹⁸ In prosecutions for forgery, as in other criminal cases, the burden is on the prosecution to establish the guilt of the accused beyond a reasonable doubt.

§ 2988. Questions of law or fact.—Whether an instrument imports a pecuniary obligation, so as to be the subject of forgery, is a question for the court.¹⁹ And whether a forged instrument is or is not a public record has also been held to be a question of law for the court.²⁰ Indeed, it is generally a question for the court as to whether or not the paper is such an instrument as to be capable of being made the subject of forgery.²¹ And the question as to the existence or location of the instrument is a preliminary question for the court to determine before secondary evidence is received.²² But it is for the jury to determine whether or not the instrument was forged.²³ And when

¹⁶ *State v. Maxwell*, 47 Iowa 454; *Haynes v. State*, 15 Ohio St. 455; *Rembert v. State*, 53 Ala. 467; see also, § 2985, note 2.

¹⁷ *Romans v. State*, 51 Ohio St. 528, 37 N. E. 1040; see also, *State v. Pine*, (W. Va.) 48 S. E. 206, to the same effect where a city clerk was charged with forging an order bearing the genuine signature of himself and the mayor.

¹⁸ *Haslip v. State*, 10 Neb. 590, 7 N. W. 331; *State v. Smith*, 31 Mo. 120; *State v. Fleshman*, 40 W. Va. 726, 22 S. E. 309; *McDonnell v. State*, 58 Ark. 242; *State v. Handy*, 20 Me. 81; *Wilson v. State*, 70 Miss. 595, 13 So. 225; *People v. Marion*, 29 Mich. 31; *State v. Harrison*, 69 N.

Car. 143; but see, *State v. Hastings*, 53 N. H. 452; *Agee v. State*, 117 Ala. 169, 21 So. 486; *Shope v. State*, 106 Ga. 226, 32 S. E. 140.

¹⁹ *Overly v. State*, 34 Tex. Cr. App. 500, 31 S. W. 377; *Lampkin v. State*, 105 Ala. 1, 16 So. 575.

²⁰ *State v. Anderson*, 30 La. Ann. 557.

²¹ *Overly v. State*, 34 Tex. Cr. App. 500, 31 S. W. 377; *People v. Smith*, 112 Mich. 192, 70 N. W. 466; *Espalla v. State*, 108 Ala. 38, 19 So. 82; *State v. Gryder*, 44 La. Ann. 962, 11 So. 573.

²² *State v. Lowry*, 42 W. Va. 205, 24 S. E. 561; *Morton v. State*, 30 Ala. 527.

²³ *Mosher v. State*, 14 Ind. 261.

the issue is whether a certain writing, as the alleged false document, was even in existence, it is a question for the jury to determine from all the evidence.²⁴ So, for the reason that it is for the jury to determine whether the instrument in question is a forgery, it has been held that it may be given to the jury without previously being proved to be forged.²⁵ If a writing is ambiguous, the jury may in a proper case infer its real meaning from all the evidence.²⁶ The weight of evidence, including credibility of witnesses, is also for the jury.²⁷ And the intent to damage or defraud is to be determined by the jury.²⁸ It has also been held that where no one but the payee had possession of a check after its delivery by the maker until it was paid, and during that time it was altered, the question as to who committed the forgery should be submitted to the jury, though there was no direct evidence against the payee.²⁹ So, generally, the question of intent is one for the jury and they may infer fraudulent intent from the statements and conduct of the accused and from all the surrounding circumstances.³⁰

§ 2989. Who competent to testify.—As a general rule, all persons are competent to testify as to a forgery who would be competent to testify as to any other fact. The former rule was that a person interested in the instrument that had been forged was not a competent witness to testify as to the forgery. Statutes in some jurisdictions and judicial decisions in many others have changed the early rule, however, so that today the rule is generally as stated above.³¹ Thus, one whose name had been forged as a maker³² or an indorser³³ is competent to testify. So, a subscribing witness may testify that his signature is forged.³⁴ But the subscribing witness to the instrument

²⁴ *Garrett v. Gonter*, 42 Pa. St. 143; *Mosher v. State*, 14 Ind. 261. 4 S. E. 766; *State v. Williams*, 66 Iowa 573, 24 N. W. 52.

²⁵ *Mosher v. State*, 14 Ind. 261; *Hess v. State*, 5 Ohio 5, 22 Am. Dec. 767; see also, *State v. Hauser*, 112 La. Ann. 313, 36 So. 396. ³¹ *Anson v. People*, 148 Ill. 494, 35 N. E. 145; *Hess v. State*, 5 Ohio 5, 22 Am. Dec. 767; *Commonwealth v. Waite*, 5 Mass. 261; *People v. Howell*, 4 Johns. (N. Y.) 296.

²⁶ *McGarr v. State*, 75 Ga. 155.

²⁷ *State v. Stephen*, 45 La. Ann. 702, 12 So. 883; *Allgood v. State*, 87 Ga. 668, 13 S. E. 569. ³² *Anson v. People*, 148 Ill. 494, 35 N. E. 145; *State v. Henderson*, 29 W. Va. 147.

²⁸ *Kotter v. People*, 150 Ill. 441, 37 N. E. 932.

²⁹ *Commonwealth v. Hide*, 15 Ky. L. R. 264, 23 S. W. 195.

³⁰ *Timmons v. State*, 80 Ga. 216,

³³ *Respublica v. Keating*, 1 Dall. (Pa.) 110.

³⁴ *People v. Sharp*, 53 Mich. 523, 19 N. W. 168.

alleged to be forged need not be produced, and proof by the person whose name is charged to be forged is held to be sufficient.³⁵ So, the obligor or person whose name appears on a forged instrument is now generally a competent witness in behalf of the prosecution as well as in behalf of the defense.³⁶ And a person whose name appears as that of the officer taking a supposed acknowledgment to a forged instrument may testify that his signature is forged.³⁷ It is stated in some of the cases that there is a duty on the part of the prosecution to call the obligor on a forged instrument.³⁸ But the person whose signature is alleged to be forged is not an indispensable witness to establish the forgery, where there is no uncertainty as to his identity.³⁹ Many jurisdictions hold that other witnesses by their testimony may establish the falsity of the instrument.⁴⁰

§ 2990. Proof of intent and knowledge.—Proof of guilty knowledge and intent to defraud is essential.⁴¹ But the intent to defraud may be inferred from the circumstances, and hence the surrounding circumstances bearing on the question of fraud are competent evidence.⁴² In proving a charge of uttering a forged instrument, it must be established that the accused knew it was forged.⁴³ There

³⁵ *Simmons v. State*, 7 Ohio 116; *Garrett v. Hanshue*, 53 Ohio St. 482, 42 N. E. 256.

³⁶ *State v. Phelps*, 11 Vt. 116; *Commonwealth v. Waite*, 5 Mass. 261; *Simmons v. State*, 7 Ohio 116; *State v. Tull*, 119 Mo. 44, 24 S. W. 1019; *Anson v. People*, 148 Ill. 494, 35 N. E. 145; *People v. Swetland*, 77 Mich. 53, 43 N. W. 779.

³⁷ *People v. Sharp*, 53 Mich. 523, 19 N. W. 168.

³⁸ *Simmons v. State*, 7 Ohio 116.

³⁹ *Anson v. People*, 148 Ill. 494, 35 N. E. 145.

⁴⁰ *Commonwealth v. Smith*, 6 S. & R. (Pa.) 568; *State v. Farrington*, 90 Iowa 673, 57 N. W. 606; *State v. Hooper*, 2 Bailey (S. Car.) 37.

⁴¹ *McGuire v. State*, 37 Ala. 161; *Elsay v. State*, 47 Ark. 572, 2 S. W. 337; *Couch v. State*, 28 Ga. 367; *Kotter v. People*, 150 Ill. 441, 37 N. E. 932; *Miller v. State*, 51 Ind. 405;

State v. Williams, 66 Iowa 573, 24 N. W. 52; *People v. Caton*, 25 Mich. 388; *Carver v. People*, 39 Mich. 786; *State v. Williams*, 152 Mo. 115, 53 S. W. 424, and authorities cited in following note.

⁴² *Burdge v. State*, 53 Ohio St. 512, 42 N. E. 594; *State v. Henderson*, 29 W. Va. 147; *Parker v. People*, 97 Ill. 32; *People v. Phillips*, 70 Cal. 61, 11 Pac. 493; *State v. Williams*, 66 Iowa 573, 24 N. W. 52; *People v. Swetland*, 77 Mich. 53, 43 N. W. 779; *State v. Morton*, 27 Vt. 310, 65 Am. Dec. 201; see also, *Lascelles v. State*, 90 Ga. 347, 16 S. E. 945, 35 Am. St. 216.

⁴³ *State v. Lowry*, 42 W. Va. 205, 24 S. E. 561; *Miller v. State*, 51 Ind. 405; *Commonwealth v. Searle*, 2 Binn. (Pa.) 332; *United States v. Mitchell*, 1 Baldw. (U. S.) 367; *Grooms v. State*, 40 Tex. Cr. App. 319, 50 S. W. 370.

was some conflict among the common law authorities as to whether there must be a fraudulent intent to defraud a particular person, but in most jurisdictions at the present time, proof of a general intent to defraud is sufficient without proof of an intent to defraud a specified person.⁴⁴ The accused may show by evidence that he was so intoxicated at the time of making the writing that he was incapable of forming the criminal intent.⁴⁵ The following have been admitted as evidence showing intent and knowledge: The manner in which the forger read the instrument to the witness, to whom he offered it;⁴⁶ that the defendant previously forged another instrument for the same article, but subsequently destroyed it;⁴⁷ and that certain statements were made by the defendant in obtaining money on the instrument.⁴⁸ It is competent to show that the defendant forged instruments similar to the one he is now charged with forging,⁴⁹ and that at about the time the forged check was uttered, he passed other forged checks.⁵⁰ An acquittal under an indictment for forging or uttering a particular forged instrument will not preclude the prosecution from proving the fact of the possession or uttering of such forged paper in another prosecution against the same party for a crime of the same character.⁵¹ On the question of intent evidence of uttering the instrument alleged to be forged is admissible.⁵² But before evidence of uttering the instrument is admissible on the question of intent the act claimed to be a forgery must first be established. It has been said: "The forgery not being in any sense established, and there being no count in the indictment against the defendant for

⁴⁴ See, *Sneel v. State*, 2 Humph. 166, 51 Pac. 553; *State v. Hahn*, 38 (Tenn.) 347; *McClure v. Commonwealth*, 86 Pa. St. 353; *State v. Hall*, 108 N. Car. 776, 13 S. E. 189; *State v. Keneston*, 59 N. H. 36; *Roush v. State*, 34 Neb. 325, 51 N. W. 755; *State v. Patch*, 21 Mont. 534, 55 Pac. 108; *Bennett v. State*, 62 Ark. 516, 532, 36 S. W. 947; *People v. Turner*, 113 Cal. 278, 45 Pac. 331; *Commonwealth v. Henry*, 118 Mass. 460; but see, *Reg. v. Hodgson*, 7 Cox Cr. Cas. 122, 36 Eng. L. & Eq. 626; *Barnes v. Commonwealth*, 101 Ky. 556, 41 S. W. 772.

⁴⁵ *People v. Ellenwood*, 119 Cal. 166, 51 Pac. 553; *State v. Hahn*, 38 La. Ann. 169.

⁴⁶ *Butler v. State*, 22 Ala. 43.

⁴⁷ *Robinson v. State*, 66 Ind. 331.

⁴⁸ *Chahoon v. Commonwealth*, 20 Gratt. (Va.) 733.

⁴⁹ *Harding v. State*, 54 Ind. 359; *Fonville v. State*, 17 Tex. App. 368; *Smith v. State*, 29 Fla. 408, 10 So. 894.

⁵⁰ *Steele v. People*, 45 Ill. 152.

⁵¹ *State v. Robinson*, 16 N. J. L. 507; *Bell v. State*, 57 Md. 108; *McCartney v. State*, 3 Ind. 354, 56 Am. Dec. 510.

⁵² *Fox v. People*, 95 Ill. 71; *Cohen v. People*, 7 Colo. 274, 3 Pac. 385.

passing or offering to pass a forged paper, it was error to admit proof that defendant did sell and transfer the paper alleged to have been forged."⁵³ On a trial for passing counterfeit bank notes or forged instruments, the state may prove the passing, by defendant, of other counterfeit notes or forged instruments for the purpose of showing a guilty intent.⁵⁴ Evidence that the party whose name was forged had no legal capacity to sign an instrument is not relevant if an intent to defraud is established.⁵⁵ It is not error to admit in evidence other forged instruments found in the possession of the accused, as bearing upon the question of guilty knowledge.⁵⁶ It has been held that where one is charged with forgery by the unauthorized filling out of a check signed by the defendant's employers in blank, that evidence of a shortage in defendant's accounts is not competent as proof as to fraudulent intent.⁵⁷

§ 2991. Proof of handwriting.—In determining whether or not an instrument has been forged, and who committed the forgery, if any, proof of handwriting is usually not only relevant, but is also necessary in many cases. In general it may be stated that the rules as to the proof of handwriting, as to the use of expert and non-expert testimony and as to standards of comparison are the same as in civil cases,⁵⁸ and the rules upon the subject, elsewhere considered,⁵⁹ are usually applicable. The fact that the forged instrument is in the handwriting of the defendant is not only relevant but, unexplained, is usually strong evidence of his guilt.⁶⁰ It is held that a signature which is admittedly genuine or clearly proved to be genuine may be compared with the disputed signature, and under modern statutes and decisions this is the rule in many jurisdictions.⁶¹ But at common

⁵³ *Luttrell v. State*, 85 Tenn. 232, 4 Am. St. 760.

⁵⁴ *Harding v. State*, 54 Ind. 359; *Card v. State*, 109 Ind. 415, 9 N. E. 591.

⁵⁵ *State v. Eades*, 68 Mo. 150; *Fox v. People*, 95 Ill. 71.

⁵⁶ *Lindsey v. State*, 38 Ohio St. 507.

⁵⁷ *People v. Dickie*, 62 Hun (N. Y.) 400, 17 N. Y. S. 51.

⁵⁸ *Birmingham Nat. Bank v. Bradley*, 108 Ala. 205, 19 So. 791; *State v. Minton*, 116 Mo. 605, 22 S. W. 808;

Thomas v. State, 103 Ind. 419, 2 N. E. 808.

⁵⁹ See, Vol. I, § 676, Vol. II, §§ 1053, 1055, 1059, 1100-1105; 12 L. R. A. 456, note; 62 L. R. A. 817, note; 63 L. R. A. 163, 427, 937, 963, notes.

⁶⁰ *Allgood v. State*, 87 Ga. 668, 13 S. E. 569; *Langdon v. People*, 133 Ill. 382, 24 N. E. 874.

⁶¹ See, *State v. Nettleton*, 1 Root (Conn.) 308; *State v. Brunson*, 1 Root (Conn.) 307; *Tyler v. Todd*, 36 Conn. 218; *Heard v. State*, 9 Tex. App. 1; *Williams v. State*, 27 Tex.

law, before the act of 1854, although there was some vacillation, and in many jurisdictions in this country, it was held, in the absence of a statute, that a paper or document shown to be in the handwriting of the accused, which had no relation to or connection with the document forged, was not admissible in evidence to prove, by comparison of the handwriting, that the forged document is in the handwriting of the accused.⁶² Thus, it has been held that notes, mortgages, wills or other papers bearing the signature of one whose name is alleged to have been forged to a deed, unless they are a part of the files in the case, or already in evidence for other purposes, cannot, on a trial for forgery, be introduced for the sole purpose of making a comparison of signatures.⁶³ It has also been held that the handwriting in an alleged forged instrument cannot be proved by comparison with writings admitted in evidence over the defendant's objection, and which are not admitted or affirmatively shown to be in the defendant's handwriting, though he does not deny them.⁶⁴ On the other hand, it has been held that the testimony of the defendant alone that he had written a letter is sufficient to authenticate the letter, so as to render it admissible for the purpose of comparison to prove forgery.⁶⁵ And it has been held that for the purposes of comparison, a hotel register in which defendant had written his name about the time of the alleged forgery, is competent evidence.⁶⁶

App. 466, 11 S. W. 481; *Bradford v. People*, 22 Colo. 157, 43 Pac. 1013; *Boggus v. State*, 34 Ga. 275; *State v. Calkins*, 73 Iowa 128, 34 N. W. 777; *Commonwealth v. Andrews*, 143 Mass. 23, 8 N. E. 643; *Morrison v. Porter*, 35 Minn. 425, 29 N. W. 54, 59 Am. R. 331; *State v. Zimmerman*, 47 Kans. 242, 27 Pac. 999; *State v. Stegman*, 62 Kans. 476, 63 Pac. 746; *Garvin v. State*, 52 Miss. 207; *State v. Brown*, 4 R. I. 528, 70 Am. Dec. 168; *Sprouse v. Commonwealth*, 81 Va. 374; and see review of authorities by states in, 62 L. R. A. 817-874, note.

⁶² *State v. Fritz*, 23 La. Ann. 55; *United States v. Prout*, 4 Cranch (U. S.) 301; *United States v. Jones*, 10 Fed. 469; *Curtis v. State*, 118 Ala. 125, 24 So. 111; *Bishop v. State*, 30 Ala. 34; *Griffin v. State*, 90 Ala. 596,

8 So. 670; *Jumpertz v. People*, 21 Ill. 375; *Jones v. State*, 60 Ind. 241; *State v. Miller*, 47 Wis. 530, 3 N. W. 31 (but see, Wis. Rev. St. 1898, § 4189a); *Rose v. First Nat. Bank*, 91 Mo. 399, 3 S. W. 876 (but see, Mo. Rev. St. 1899, § 4679); *State v. Koontz*, 31 W. Va. 127, 5 S. E. 328.

⁶³ *People v. Parker*, 67 Mich. 222, 34 N. W. 720, 11 Am. St. 578; in, *People v. Marion*, 29 Mich. 31, it is held that a seal may be shown to be false by comparison with one that is genuine.

⁶⁴ *State v. Ezekiel*, 33 S. Car. 115, 11 S. E. 635.

⁶⁵ *Mallory v. State*, 37 Tex. Cr. App. 482, 36 S. W. 751; but see, *Jones v. State*, 60 Ind. 241; *Hazzard v. Vickery*, 78 Ind. 64.

⁶⁶ *State v. Farrington*, 90 Iowa 673, 57 N. W. 606; see also, *State v. Shin-*

And so it has been held that the use of defendant's signature to an application for a continuance as a standard of comparison cannot be objected to on the ground that it is not sufficiently proved to be his signature, since he is estopped from denying its genuineness.⁶⁷ And it is generally held, no matter which view is taken as to the admissibility of other writings for the mere purpose of comparison, that papers already in evidence and admitted to be in the handwriting of the defendant may be compared by the jury with the paper in dispute in determining the handwriting of the latter.⁶⁸ On a trial for forgery of a mortgage, the persons whose names appear as acknowledging officer and subscribing witness may testify that they did not sign the instrument, though the subscribing witness was not named in the information.⁶⁹ It has also been held immaterial that the writing alleged to have been forged is badly written, for if it can be made out it is good evidence.⁷⁰ And the fact that the alleged forger imitated the handwriting of the party whose name is signed to the instrument is a circumstance that may be considered by the jury even though the accused admits that he signed it and claims that he had authority to do so.⁷¹ But it is not, ordinarily relevant to show that the accused was skilled in imitating writing, and thus had the capacity or ability to commit the crime, where he has introduced no evidence upon the subject.⁷²

§ 2992. Production of forged instrument.—The instrument alleged to have been forged is, of course, admissible,⁷³ and as a general rule, at least, it must be introduced in evidence at the trial if pos-

born, 46 N. H. 497, 88 Am. Dec. 224.

⁶⁷ *State v. Farrington*, 90 Iowa 673, 57 N. W. 606; see also, *State v. Thompson*, 132 Mo. 301, 34 S. W. 31; *Tucker v. Hyatt*, 144 Ind. 635, 41 N. E. 1047, 43 N. E. 872.

⁶⁸ *Stokes v. United States*, 157 U. S. 187, 15 Sup. Ct. 617; *Moore v. United States*, 91 U. S. 270; *Hickory v. United States*, 151 U. S. 303, 14 Sup. Ct. 334; *McDonnell v. State*, 58 Ark. 242, 24 S. W. 105, and authorities cited in the preceding notes to this section.

⁶⁹ *People v. Sharp*, 53 Mich. 523, 19 N. W. 168.

⁷⁰ *McGarr v. State*, 75 Ga. 155.

⁷¹ *State v. Lurch*, 12 Ore. 99, 6 Pac. 408; see also, *Walker v. Logan*, 75 Ga. 759; *West v. State*, 22 N. J. L. 212; *Riley v. State*, (Tex. Cr. App.) 44 S. W. 498; *Neall v. United States*, 118 Fed. 699.

⁷² *State v. Hopkins*, 50 Vt. 316; *Dow v. Spenny*, 29 Mo. 386; but see, *Croom v. Sugg*, 110 N. Car. 259, 14 S. E. 748.

⁷³ *People v. Dole*, 122 Cal. 486, 55 Pac. 581.

sible.⁷⁴ Thus, it is generally held that the prosecution must produce the false writing, or it must be accounted for by showing that the accused has possession of it, or that it has been destroyed, or the like.⁷⁵ And it is also held that the accused must be given notice to bring to the trial the false writing when the same is in his possession.⁷⁶ So, it has been held that it is error to admit evidence of other similar forged notes in the defendant's possession, without producing such other notes in court, or giving the defendant notice, if they are in his possession.⁷⁷

§ 2993. Secondary evidence of forged instrument.—In case the non-production of an instrument is satisfactorily accounted for, and the foundation properly laid, secondary evidence of its contents is admissible,⁷⁸ in a proper case. As a general rule the contents of an alleged forged writing may be proved by secondary evidence under the same circumstances that the contents of any other writing may be so proved.⁷⁹ If there is a copy which can be sworn to, it should generally be introduced, and if there is not such a copy then proof by parol evidence is sufficient.⁸⁰ That is, the prevailing rule as to the best evidence being produced exists as to the production of the writing alleged to have been forged. Thus, if a copy exists, oral proof is not admissible and the copy should be introduced.⁸¹ Secondary evidence is admissible where it is shown that the instrument

⁷⁴ *People v. Swetland*, 77 Mich. 53, 43 N. W. 779; 2 Bishop Cr. Proc. 387; *Hughes Cr. Law*, § 964.

⁷⁵ *People v. Kingsley*, 2 Cow. (N. Y.) 522, 14 Am. Dec. 520; *State v. Callendine*, 8 Iowa 288; *Manaway v. State*, 44 Ala. 375; *People v. Swetland*, 77 Mich. 53, 43 N. W. 779; *State v. Lowry*, 42 W. Va. 205, 24 S. E. 561; *Cross v. People*, 192 Ill. 291, 61 N. E. 400.

⁷⁶ *State v. Kimbrough*, 13 N. Car. 431; *State v. Lowry*, 42 W. Va. 205, 24 S. E. 561; *Rollins v. State*, 21 Tex. App. 148, 17 S. W. 466; *State v. Cole*, 19 Wis. 142.

⁷⁷ *State v. Breckenridge*, 67 Iowa 204, 206, 25 N. W. 130; *State v. Cole*, 19 Wis. 129, 88 Am. Dec. 678.

⁷⁸ *Manaway v. State*, 44 Ala. 375;

Cross v. People, 192 Ill. 291, 61 N. E. 400; *State v. Potts*, 9 N. J. L. 26, 17 Am. Dec. 449; *Dovalina v. State*, 14 Tex. App. 312; see also, *Commonwealth v. Snell*, 3 Mass. 82; *Thornley v. State*, 36 Tex. Cr. App. 118, 34 S. W. 264; *State v. Davis*, 69 N. Car. 313.

⁷⁹ *Mead v. State*, 53 N. J. L. 601, 23 Atl. 264; *Henderson v. State*, 14 Tex. 503.

⁸⁰ *Commonwealth v. Snell*, 3 Mass. 82; *State v. Lowry*, 42 W. Va. 205, 24 S. E. 561; *Mead v. State*, 53 N. J. L. 601, 23 Atl. 264.

⁸¹ *Commonwealth v. Snell*, 3 Mass. 82; *Thompson v. State*, 30 Ala. 28; see also, *State v. Ford*, 2 Root (Conn.) 93.

was destroyed for the purpose of protecting the forger, though without his privity.⁸² So also, where it appears that the instrument has been destroyed or suppressed by the forger.⁸³ And also, in some cases where it has been mutilated.⁸⁴ Where it is shown that an instrument is beyond the jurisdiction of the court secondary evidence is admissible if notice has been given to produce the original on the trial.⁸⁵ And it is held that if the instrument is in the forger's hands, secondary evidence is admissible, but that notice to produce it must be given to him before evidence of its existence, contents and character will be received in evidence.⁸⁶ But it would not be altogether unreasonable, nor entirely without precedent, to hold that the indictment itself is sufficient notice and that if the forged writing is shown to be in the possession of the defendant, and he does not produce it, he ought not to be allowed to complain of the admission of secondary evidence.⁸⁷ At all events, if forged instruments are in the possession of the defendant, and not produced, the next best evidence of their contents may be given, even though it is parol, after service of notice to produce them.⁸⁸ And photographic copies are admissible, in a proper case, together with the testimony of the photographer as to their accuracy, where the accused refuses to produce the original in his possession, or where they constitute the best evidence obtainable.⁸⁹

§ 2994. Other forged instruments.—Testimony as to other forgeries, or of the possession of forged papers about the same time, has generally been held admissible to establish a uniform course of acting

⁸² *Pendleton v. Commonwealth*, 4 Leigh (Va.) 694, 26 Am. Dec. 342.

⁸³ *Ross v. Bruce*, 1 Day (Conn.) 100.

⁸⁴ *Thompson v. State*, 30 Ala. 28.

⁸⁵ *Thornley v. State*, 36 Tex. Cr. App. 118, 34 S. W. 264.

⁸⁶ *Rollins v. State*, 21 Tex. App. 148, 17 S. W. 466; *State v. Kimbrough*, 13 N. Car. 431; *State v. Flander*, 118 Mo. 227, 23 S. W. 1086; *State v. Lowry*, 42 Va. 205, 24 S. E. 561; *State v. Cole*, 19 Wis. 142; *Rex v. Haworth*, 4 Car. & P. 254; see also, *State v. Saunders*, 68 Iowa 370, 27 N. W. 455; but see, *Ross v. Bruce*, 1 Day (Conn.) 100.

⁸⁷ See, *United States v. Doeblor*, Baldw. (U. S.) 519, 25 Fed. Cas. No. 14,977; *People v. Swetland*, 77 Mich. 53, 43 N. W. 779, 780; *McGinnis v. State*, 24 Ind. 500, 503; see also, *State v. Wilkerson*, 98 N. Car. 696, 3 S. E. 683; *People v. Holbrook*, 13 Johns. (N. Y.) 90.

⁸⁸ *Armitage v. State*, 13 Ind. 441; *Williams v. State*, 16 Ind. 461, and authorities cited in preceding notes.

⁸⁹ *Duffin v. People*, 107 Ill. 113, 47 Am. R. 431; *United States v. Ortiz*, 176 U. S. 422, 20 Sup. Ct. 466; see also, *Grooms v. State*, 40 Tex. Cr. App. 319, 50 S. W. 370.

from which guilty knowledge and criminal intent may be inferred.⁹⁰ But evidence of the declarations of the defendant in respect to alleged forged instruments which are not produced to the jury or proved to be forgeries should not be admitted.⁹¹ So, statements as to other instruments of the same kind as the one alleged to have been forged are not usually admissible.⁹² But facts showing that the accused uttered other false writings under similar circumstances are admissible in a proper case.⁹³ Proof of possession and of use of forged papers, whether by the accused or by an accomplice, has been held admissible, whether before or after the time of the forgery for which the accused is being tried.⁹⁴ But when other writings found on defendant's person were admitted in evidence without proof that they were also forgeries it was considered reversible error.⁹⁵ And, in general, other similar papers are not admissible unless it is first shown that such papers were forged, and the accused had guilty connection therewith.⁹⁶ So, it has been held error to allow a witness to answer a question as to whether there was ever any question about a certain other note he had signed with defendant, such note not being produced, nor its absence accounted for.⁹⁷ But evidence that at the time of the arrest of the alleged forger he had with him checks, and about that time had passed others, all of which were forgeries, is admissible as tending to show his guilty knowledge as to the check set out in the indictment as that his purpose in the forgery and the

⁹⁰ *People v. Everhardt*, 104 N. Y. 591, 11 N. E. 62; *Fox v. People*, 95 Ill. 71; *Commonwealth v. Russell*, 156 Mass. 196, 30 N. E. 763; *State v. Minton*, 116 Mo. 605, 22 S. W. 808; *Card v. State*, 109 Ind. 415, 9 N. E. 591; *People v. Bibby*, 91 Cal. 470, 27 Pac. 781; *Davis v. State*, 58 Neb. 465, 78 N. W. 930; *State v. Allen*, 56 S. Car. 495, 35 S. E. 204; *Bell v. State*, 57 Md. 108; *Lindsey v. State*, 38 Ohio St. 107; *State v. Prins*, 117 Iowa 505, 91 N. W. 758.

⁹¹ *Anson v. People*, 148 Ill. 494, 35 N. E. 145.

⁹² *Fox v. People*, 95 Ill. 71; *Reg. v. Cooke*, 8 Car. & P. 582.

⁹³ *Commonwealth v. White*, 145 Mass. 392, 14 N. E. 611; *People v. Frank*, 28 Cal. 507; *Anson v. People*,

148 Ill. 494, 35 N. E. 145; *Robinson v. State*, 66 Ind. 331; *Carver v. People*, 39 Mich. 786; *People v. Everhardt*, 104 N. Y. 591, 11 N. E. 62; *State v. Hodges*, 144 Mo. 50, 45 S. W. 1093.

⁹⁴ *Harding v. State*, 54 Ind. 359; *Commonwealth v. Price*, 10 Gray (Mass.) 472; *Commonwealth v. White*, 145 Mass. 392, 6 N. E. 611.

⁹⁵ *People v. Altman*, 147 N. Y. 473, 42 N. E. 180.

⁹⁶ *State v. Lowry*, 42 W. Va. 205, 24 S. E. 561; *People v. Whiteman*, 114 Cal. 338, 46 Pac. 99; *People v. Bird*, 124 Cal. 32, 56 Pac. 639; *State v. Rose*, 70 Minn. 403, 73 N. W. 177.

⁹⁷ *State v. Saunders*, 68 Iowa 370, 27 N. W. 455.

uttering was to defraud.⁹⁸ And evidence as to an indictment for another forgery has been held admissible even though the accused was acquitted of such other crime, since the acquittal does not necessarily prove that he was innocent of the charge.⁹⁹

§ 2995. Evidence in general.—Circumstantial evidence is admissible in proving the crime of forgery, and usually it is necessary to make out the crime by circumstantial evidence.¹⁰⁰ Thus, proof of the place where the forgery was committed may be made by circumstantial as well as by direct evidence.¹⁰¹ So, it is not necessary that the intent to defraud be established by direct proof; it may be inferred from the facts and circumstances.¹⁰² And it has been held that evidence of the pecuniary condition of the accused at or about the date of the receipt alleged to have been forged is admissible, as tending to show that the receipt had been forged.¹⁰³ But on the prosecution of a person for forging his mother's name on a note as surety for himself, evidence of the relative property interests of defendant and his mother has been held incompetent.¹⁰⁴ Although obtaining money on a forged deed is not of itself proof of forgery, yet it is a circumstance in relation to the uttering and the intent which the jury may take into consideration in reaching their decision.¹⁰⁵ So, inculpatory acts of the accused are often admissible for the purpose of proving the forgery.¹⁰⁶ The general rule as to confessions applies to confessions in case of forgery. A confession induced by threats or improper promises is not admissible.¹⁰⁷ But it was held competent and not compelling one to furnish evidence against himself where he was asked by the magistrate on examination to write the name of

⁹⁸ *Commonwealth v. Russell*, 156 Mass. 196, 30 N. E. 763; *Bishop v. State*, 55 Md. 138; but see, *Joiner v. State*, (Tex. Cr. App.) 80 S. W. 531.

⁹⁹ *Commonwealth v. White*, 145 Mass. 392, 14 N. E. 611; *Bell v. State*, 57 Md. 108; *State v. McAllister*, 24 Me. 139; *McCartney v. State*, 3 Ind. 353; *State v. Robinson*, 16 N. J. L. 507.

¹⁰⁰ *Commonwealth v. Bargar*, 2 Law T. (N. S.) (Pa.) 161.

¹⁰¹ *State v. Chamberlain*, 89 Mo. 129.

¹⁰² *Fletcher v. State*, 49 Ind. 124,

19 Am. R. 673; *State v. Hahn*, 38 La. Ann. 169.

¹⁰³ *State v. Henderson*, 29 W. Va. 147, 1 S. E. 225.

¹⁰⁴ *State v. Tull*, 119 Mo. 421, 24 S. W. 1010.

¹⁰⁵ *United States v. Brooks*, 3 MacArth. (D. C.) 315.

¹⁰⁶ *People v. King*, 125 Cal. 369, 58 Pac. 19; *State v. Williams*, 27 Vt. 724; *Burdge v. State*, 53 Ohio St. 512, 42 N. E. 594; *Riley v. State*, (Tex. Cr. App.) 44 S. W. 498.

¹⁰⁷ *State v. Walker*, 34 Vt. 296, 301; see, Vol. I, § 217, et seq.

the person whose name had been forged, which, without threat or promise, he did, misspelling it as it was misspelled in the forged instrument.¹⁰⁸ And confessions relative to other forged instruments of the same character found in the defendant's possession when arrested and shown to be forgeries have been held admissible.¹⁰⁹ But, ordinarily, statements as to other instruments, at least when they are not produced or otherwise shown to be forgeries, are not admissible.¹¹⁰ The state may prove in a proper case, that a name partially obliterated by wear and tear was, at the time of the execution of the note, written plainly upon it.¹¹¹ So, the chemical effect of a powder in the possession of defendant may be shown to the jury as bearing on the manner in which the alteration was effected.¹¹² In a prosecution for forgery of a note, evidence tending to show that the note was used to secure a valuable benefit from the person to whom it was delivered, has been held admissible, though it was of facts taking place after the delivery of the note.¹¹³ Evidence is admissible in a proper case to show that the forged name is fictitious.¹¹⁴ So, generally, evidence is admissible, which shows or tends to show the existence or non-existence of the person who is supposed, or pretended to be indicated by the name, since forgery is committed when a fictitious name or the name of a dead person is attached to a paper with a fraudulent intent.¹¹⁵ Records of former proceedings in which such forgery was the subject of litigation have been admissible in evidence.¹¹⁶ And on a trial for forging an order for merchandise, evidence is admissible that defendant declared when he presented it that it was an order from the person whose name it bore.¹¹⁷ When the matter at issue is as to the

¹⁰⁸ *Sprouse v. Commonwealth*, 81 Va. 374.

¹⁰⁹ *Commonwealth v. Russell*, 156 Mass. 196, 30 N. E. 763.

¹¹⁰ See, *Fox v. People*, 95 Ill. 71; *Reg. v. Cooke*, 8 Car. & P. 582; *Jonier v. State*, (Tex. Cr. App.) 80 S. W. 531.

¹¹¹ *Inman v. State*, 35 Tex. Cr. App. 36, 30 S. W. 219.

¹¹² *People v. Brotherton*, 47 Cal. 388; *People v. Dole*, 122 Cal. 486, 55 Pac. 581.

¹¹³ *People v. Phillips*, 70 Cal. 61, 11 Pac. 493.

¹¹⁴ *State v. Hahn*, 38 La. Ann. 169; *Commonwealth v. Meserve*, 154

Mass. 64, 27 N. E. 997; *People v. Sharp*, 53 Mich. 523, 19 N. W. 168; *People v. Jones*, 106 N. Y. 523, 13 N. E. 93.

¹¹⁵ *Commonwealth v. Costello*, 120 Mass. 358; *Brewer v. State*, 32 Tex. Cr. App. 74, 22 S. W. 41; *State v. Bauman*, 52 Iowa 68; *State v. Covington*, 94 N. Car. 913, and authorities cited in last note, *supra*.

¹¹⁶ *State v. Henderson*, 29 W. Va. 147, 1 S. E. 225; *State v. Calkins*, 73 Iowa 128, 34 N. W. 777; *Perkins v. People*, 27 Mich. 386.

¹¹⁷ *Gardner v. State*, 96 Ala. 12, 11 So. 402.

uttering of a forged promissory note, evidence tending to show that the note had been paid is immaterial and should be excluded.¹¹⁸ And in an indictment for the forgery of a note, the letter of the cashier of a bank, to whom the note was sent for collection, making suggestions as to the residence of the parties to the note, is not admissible in evidence.¹¹⁹ But evidence has been held admissible to show that defendant, at the time of negotiating an alleged forged note represented that the maker thereof lived at a certain place, and that the note would be paid when due, while in fact no such person lived at that place.¹²⁰ It has also been held that evidence that the defendant had forged the same signature to a chattel mortgage given to secure the note is material.¹²¹ It is generally held that since the forged instrument is void there can be no subsequent ratification so as to bar a prosecution for the crime.¹²² It is not necessary to produce all the persons through whose hands the instrument had passed.¹²³ But it must appear that the instrument was a forged instrument when it left defendant's hands.¹²⁴ Testimony of the husband of one who is alleged to have secured a loan and given a note to cover the same that he did not know or hear of her having that amount of money at or about the time of the execution of the note is not admissible.¹²⁵ But it is held that the meaning of the writing alleged to have been forged may be ascertained when necessary by parol evidence.¹²⁶

§ 2996. Evidence in defense.—The accused may show that intemperance had so far impaired his mind as to render him incapable of having a fraudulent intent.¹²⁷ So, he may, of course, show by proper evidence, that he did not forge the writing in question, or that he had authority to sign the name, or the like.¹²⁸ It has also been held

¹¹⁸ *People v. Brown*, 72 N. Y. 571; see also, *Joiner v. State*, (Tex. Cr. App.) 80 S. W. 531.

¹¹⁹ *Farrington v. State*, 10 Ohio 354.

¹²⁰ *Commonwealth v. Norris*, 9 Montg. Co. (Pa.) 143.

¹²¹ *People v. De Kroyft*, 49 Hun (N. Y.) 71, 1 N. Y. S. 692.

¹²² *McHugh v. Schuylkill Co.*, 67 Pa. St. 391, 5 Am. R. 445; *Workman v. Wright*, 33 Ohio St. 405, 31 Am. R. 546; *Howell v. McCrie*, 36 Kans. 636, 14 Pac. 257.

¹²³ *Bank of Pennsylvania v. Halderman*, 1 Pen. & W. (Pa.) 161.

¹²⁴ *McDonnell v. State*, 58 Ark. 242, 24 S. W. 105.

¹²⁵ *People v. Stoddard*, 64 Hun (N. Y.) 633, 19 N. Y. S. 937.

¹²⁶ *McGarr v. State*, 75 Ga. 155.

¹²⁷ *Williams v. State*, 126 Ala. 50, 28 So. 632; *People v. Blake*, 65 Cal. 275, 4 Pac. 1; *People v. Ellenwood*, 119 Cal. 166, 51 Pac. 553; *State v. Hahn*, 38 La. Ann. 169.

¹²⁸ And even though he had no authority, it may not be forgery if he

that evidence tending to show that the instrument forged could not hurt any one is competent evidence for the defendant.¹²⁹ But if the accused altered the instrument with intent to defraud, and it was capable of having that effect, it is no defense that the alterations were plain and that no special attempt was made to conceal them.¹³⁰ Nor does the fact that the person whose name is forged was indebted to the defendant justify the forgery.¹³¹ And lack of vigilance on the part of the one defrauded will not excuse the accused.¹³² So, the fact that the accused intended to repay the party defrauded, or did repay him, is not a good defense.¹³³

§ 2997. Weight and sufficiency of evidence.—Evidence is sufficient to sustain a charge of uttering forged paper when there is proof that the paper, capable of defrauding, was delivered to one for value by the defendant, knowing it to be false, and with an intent to pass it as a valid subsisting instrument, or it was used, under such circumstances, to obtain money or credit.¹³⁴ But there must appear to have been in effect a statement or representation by word or conduct, that the signature was valid and the instrument genuine.¹³⁵ The mere possession of a false instrument is not sufficient proof of the crime in the absence of a guilty intent or knowledge.¹³⁶ But possession of a forged instrument in favor of the person holding it

supposed he had. *State v. Taylor*, 46 La. Ann. 1332, 16 So. 190.

¹²⁹ *Barnum v. State*, 15 Ohio 717, 45 Am. Dec. 601; see also, *Roode v. State*, 5 Neb. 174; *Terry v. Commonwealth*, 87 Va. 672, 13 S. E. 104.

¹³⁰ *Rohr v. State*, 60 N. J. L. 576, 38 Atl. 673; see also, *State v. Robinson*, 16 N. J. L. 507, 510. Nor is similarity in name a good defense in such a case. *People v. Rushing*, 130 Cal. 449, 62 Pac. 742; *Barfield v. State*, 29 Ga. 127, 74 Am. Dec. 49; *People v. Peacock*, 6 Cow. (N. Y.) 72.

¹³¹ *Curtis v. State*, 118 Ala. 125, 24 So. 111.

¹³² *United States v. Turner*, 7 Pet. (U. S.) 132; *Commonwealth v. Foster*, 114 Mass. 311, 19 Am. R. 353; *Garmire v. State*, 104 Ind. 444, 4 N. E. 54; *Lawless v. State*, 114 Wis. 189, 89 N. W. 891.

¹²⁸ *Commonwealth v. Henry*, 118 Mass. 460; *Green v. State*, 36 Tex. Cr. App. 109, 35 S. W. 971; *Reg. v. Beard*, 8 Car. & P. 143. Nor is ratification. *Howell v. McCrie*, 36 Kans. 636, 14 Pac. 247; *State v. Tull*, 119 Mo. 421, 24 S. W. 1010; *Countee v. State*, (Tex. Cr. App.) 33 S. W. 127.

¹³⁴ *Thurmond v. State*, 25 Tex. App. 366, 8 S. W. 473; *State v. Redstrake*, 39 N. J. L. 365; *People v. Ah Woo*, 28 Cal. 205; *People v. Rathbun*, 21 Wend. (N. Y.) 509.

¹³⁵ *Folden v. State*, 13 Neb. 328, 14 N. W. 412; *People v. Brigham*, 2 Mich. 550; *Couch v. State*, 28 Ga. 367.

¹³⁶ *People v. Dole*, 122 Cal. 486, 55 Pac. 581; *Millsaps v. State*, 38 Tex. Cr. App. 570, 43 S. W. 1015.

has been sufficient to raise a presumption that he forged it or caused it to be forged.¹³⁷ And when one passes a forged instrument, representing himself to be the payee, such representation is sufficient without other evidence to indicate a knowledge of the forgery.¹³⁸ The possession of forged writings, or the passing of them in the county where the indictment was found, is considered of great weight as tending to show that the forgery was committed in that county.¹³⁹ And some jurisdictions hold that proof of venue in a prosecution for forgery is sufficient if it appears that the offer to pass the forged instrument by the accused, with full knowledge of its character, was made in the parish or county where the charge is brought, though it did not purport on its face to have been executed in such parish or county.¹⁴⁰ Where the defendant, in an action on an insurance policy, claimed that the plaintiff was not the owner of the premises on which the burned buildings were located, and plaintiff claimed title through a deed from his wife made in a certain year, and there was evidence that the printed blank on which the deed was written was not printed until four years later, and that his wife died in the year he claimed the deed was made, it was held that the finding that the deed was a forgery was properly supported.¹⁴¹ It is generally held that the accused may commit a forgery by procuring another to do the writing.¹⁴² And where one was present, knowing of and asserting to the commission of a forgery, of which he was to derive the benefit, it was held that the jury might infer that it was done by his procurement.¹⁴³ But evidence showing that the accused acted for another, although the authority so to act was falsely and fraudulently assumed, is of itself insufficient to establish a forgery by the accused.¹⁴⁴ There is sufficient evidence of intent to defraud by the

¹³⁷ *Hobbs v. State*, 75 Ala. 1; *Commonwealth v. Talbot*, 2 Allen (Mass.) 161; *State v. Britt*, 3 Dev. L. (N. Car.) 122.

¹³⁸ *State v. Beasley*, 84 Iowa 83, 50 N. W. 570.

¹³⁹ *State v. Rucker*, 93 Mo. 88, 5 S. W. 609; *Spencer v. Commonwealth*, 2 Leigh (Va.) 751; *Bland v. People*, 4 Ill. 364; *State v. Poindexter*, 23 W. Va. 805; but see, *Commonwealth v. Parmenter*, 5 Pick. (Mass.) 279.

¹⁴⁰ *State v. Morgan*, 35 La. Ann.

293; see also authorities cited in last note, *supra*.

¹⁴¹ *Ryan v. Rockford Ins. Co.*, 85 Wis. 573, 55 N. W. 1025.

¹⁴² *Commonwealth v. Foster*, 114 Mass. 311, 19 Am. R. 353; *Koch v. State*, 115 Ala. 99, 22 So. 471.

¹⁴³ *Commonwealth v. Stevens*, 10 Mass. 181.

¹⁴⁴ *Commonwealth v. Baldwin*, 11 Gray (Mass.) 197; *Mann v. People*, 15 Hun (N. Y.) 155; *People v. Bedit*, 111 Cal. 274, 43 Pac. 901; *Kegg*

defendant where an instrument in question was forged and was made payable to him and he indorsed it.¹⁴⁵ But where all the evidence against the accused was given by an expert on handwriting, who by a comparison with the genuine writing of the accused stated that in his opinion the face of the check was written by the accused, it was held that such testimony was not sufficient to sustain a conviction, even if the words, "face of the check" included the signature.¹⁴⁶ A charge of an intent to defraud generally is sustained by proof that the name signed to the forged instrument was that of a fictitious person.¹⁴⁷ On a prosecution for having in possession, with intent to pass them, bank notes purporting to have been issued by a foreign banking corporation, proof of a general character of the existence of the bank is sufficient and it is not necessary to put the original charter in evidence or to produce the law under which the bank is incorporated, but it may be shown by parol evidence.¹⁴⁸ Proof of the crime is sufficient without any proof as to actual damages.¹⁴⁹ As already shown, the credibility of witnesses is for the jury and it is for the jury to weigh the evidence. But the jury must, of course, have some sufficient legal evidence to act on before a verdict of guilty can be sustained. It is held that the interest of an obligor on a forged instrument may be shown to affect the credibility of his testimony.¹⁵⁰

§ 2998. **Variance.**—The general rule is that the proof as to the contents and description of the instrument forged must correspond in material respects to the description given in the indictment, and while a slight variance is not always fatal and something may depend

v. State, 10 Ohio 75; State v. Millner, 131 Mo. 432, 33 S. W. 15.

¹⁴⁵ Timmons v. State, 80 Ga. 216, 4 S. E. 766.

¹⁴⁶ People v. Mitchell, 92 Cal. 590, 27 Pac. 597.

¹⁴⁷ Johnson v. State, 35 Tex. Cr. App. 271, 33 S. W. 231.

¹⁴⁸ People v. Davis, 21 Wend. (N. Y.) 309; People v. Chadwick, 2 Park. Cr. Cas. (N. Y.) 163; People v. D'Argencour, 95 N. Y. 624; State v. Williams, 152 Mo. 115, 53 S. W. 424; see also, People v. Ah Sam, 41 Cal. 645; Commonwealth v. Carey, 2 Pick. (Mass.) 47.

¹⁴⁹ People v. Flitch, 1 Wend. (N. Y.) 198, 19 Am. Dec. 477; Commonwealth v. Ladd, 15 Mass. 526; Arnold v. Cost, 3 Gill & J. (Md.) 219, 22 Am. Dec. 302; People v. Brigham, 2 Mich. 550; see also, Scott v. State, 40 Tex. Cr. App. 105, 48 S. W. 523; State v. Duffield, 49 W. Va. 274, 38 S. E. 577, but it has been held error to admit such evidence. People v. Phillips, 70 Cal. 61, 11 Pac. 493; Arnold v. Cost, 3 Gill & J. (Md.) 219, 22 Am. Dec. 302.

¹⁵⁰ State v. Henderson, 29 W. Va. 147.

upon the manner in which the instrument is pleaded in the indictment or information, yet if there is a material variance between the pleading and the proof in this respect it will generally be fatal.¹⁵¹ There is some conflict, however, as to what constitutes a material variance, and some of the courts have, perhaps, been too much inclined to hold a very slight variance material. Thus, it has been held that the misspelling of the alleged forged name as proved or reversing the order of names are material variances and are fatal when the writings were pleaded according to their tenor.¹⁵² So, also, omission of a final letter from the alleged forged name as proved has been held a material and fatal variance between the alleged forged writing as proved and as set forth in the indictment.¹⁵³ So, likewise, has the omission of a single figure from the amount.¹⁵⁴ Many cases, however, disregard such seemingly unimportant variances and hold the evidence sufficient notwithstanding such a variance appears.¹⁵⁵ So it has been held that the fact that the writing proved was acknowledged while that set out in the indictment was not, is not a material and fatal variance such as to make the proof insufficient.¹⁵⁶ It has also been held that an allegation of an intent to defraud several persons is sustained by proving an intent to defraud any one of them.¹⁵⁷

¹⁵¹ *State v. Pease*, 74 Ind. 263, and authorities cited in following notes.

¹⁵² *Westbrook v. State*, 23 Tex. App. 401, 5 S. W. 248; *McClellan v. State*, 32 Ark. 609; *State v. Woodrow*, 56 Kan. 217, 42 Pac. 714; *State v. Lane*, 80 N. Car. 407; *State v. Harrison*, 69 N. Car. 143.

¹⁵³ *Burress v. Commonwealth*, 27 Gratt. (Va.) 934.

¹⁵⁴ *Burress v. Commonwealth*, 27 Gratt. (Va.) 934.

¹⁵⁵ *Garmire v. State*, 104 Ind. 444, 4 N. E. 54; *Roush v. State*, 34 Neb.

325, 51 N. W. 755; *State v. Gryder*, 44 La. Ann. 962, 11 So. 573; *State v. Lane*, 80 N. Car. 407; *State v. Davis*, 69 N. Car. 313; *Cross v. People*, 47 Ill. 152; *State v. Hastings*, 53 N. H. 452; *Agee v. State*, 117 Ala. 169, 23 So. 486; *Commonwealth v. Woods*, 10 Gray (Mass.) 477.

¹⁵⁶ *People v. Baker*, 100 Cal. 188, 34 Pac. 649; *Lassiter v. State*, 35 Tex. Cr. App. 540, 34 S. W. 751.

¹⁵⁷ *McDonnell v. State*, 58 Ark. 242, 24 S. W. 105; see also, *State v. Davis*, 69 N. Car. 313.

CHAPTER CXLIV.

GAMBLING.

Sec.	Sec.
2999. Generally.	3005. Gambling instruments in evidence.
3000. The wager or stake.	3006. Accomplices and accessories.
3001. Publicity of the game.	3007. Variance.
3002. Manner of playing.	3008. Common gamblers.
3003. Statutes as to prima facie evidence.	3009. Keeping gambling house.
3004. Circumstantial evidence— Other offenses.	3010. Minors playing.
	3011. Lotteries.

§ 2999. **Generally.**—Gaming or gambling has been defined as “an unlawful agreement between two or more persons to risk money or property on a contest or chance of any kind where one must be the gainer and the other the loser.”¹ There is said to be a distinction between the terms “betting” and “gaming;” the former being broader, and including the laying of a wager on any event, whereas the latter applies technically only to the paying of a wager upon some game.² Gaming in itself, when not such as to constitute a nuisance, was not a crime at common law.³ But keeping a gaming house was indictable at common law, and there are statutes in many of the states making it a

¹ Hughes Cr. L. & Proc., § 2193; see also, *Ansley v. State*, 36 Ark. 67, 38 Am. R. 29; *Portis v. State*, 27 Ark. 360; *State v. Shaw*, 39 Minn. 153, 39 N. W. 305; *Harrison v. State*, 4 Coldw. (Tenn.) 198; *Eubanks v. State*, 3 Heisk. (Tenn.) 488, 490; *Bell v. State*, 5 Sneed (Tenn.) 507; “gaming is the act of persons who engage in playing a game for stakes.” 1 Abbott L. Dict. 529. “Gambling is the risking of money or anything of value between two or more persons on a contest of chance of any kind, where one

must be the loser and the other the gainer.” *State v. Grimes*, 74 Minn. 257, 77 N. W. 4, 5. “But it has been held unnecessary that both parties should “stand to lose” as well as to win. *Lang v. Merwin*, (Me.) 59 Atl. 1021; *Horner v. United States*, 147 U. S. 449, 13 Sup. Ct. 409.

² *People v. Welthoff*, 51 Mich. 203, 210, 16 N. W. 442, 47 Am. R. 557.

³ *Bell v. Norwich*, 3 Dyer 254b; *Sherbon v. Colebach*, 2 Vent. 175; *Greenhuff's Case*, 2 Swinton 236; 1 Bishop Cr. Law, § 504; Bishop Stat. Cr., § 847.

criminal offense to bet on elections, horse racing and the like, and to keep or rent houses for the purpose of gaming.⁴ To constitute gaming in the technical sense, it is necessary that there should be a game upon which the wager is laid.⁵ A wager of some kind is an essential element of the offense⁶ and so is the element of chance or hazard.⁷ Betting on an election has been held not to be gaming,⁸ although it is punishable as an offense under specific statutes in many states. Betting on a horse-race has also been held not to be gaming in some jurisdictions,⁹ but the weight of authority, at least under many of the statutes, is probably to the contrary.¹⁰ "A game of chance," it is said, "may be defined as one in which the result is determined by luck or lot, and not by adroitness, practice, skill, or judgment in play, such as, for example, cards, dominoes,¹¹ bagatelle,¹² bowls,¹³ base ball,¹⁴ dice throwing,¹⁵ or keno.¹⁶ Such games are gambling when played for money or other valuable thing."¹⁷ It is doubtful, however, if all of

⁴ See, Bishop Stat. Cr., §§ 844-881, 934, et seq. So as to lotteries. Bishop Stat. Cr., § 951, et seq.; see also, Horner v. United States, 147 U. S. 449, 13 Sup. Ct. 409.

⁵ People v. Weithoff, 51 Mich. 203, 16 N. W. 442, 47 Am. R. 557; Smoot v. State, 18 Ind. 18.

⁶ Reg. v. Ashton, 1 El. & Bl. 286, 72 E. C. L. 286; Ansley v. State, 36 Ark. 67, 38 Am. R. 29; State v. Hope, 15 Ind. 474; Carr v. State, 50 Ind. 178; People v. Carroll, 80 Cal. 153, 22 Pac. 129; State v. Quaid, 43 La. Ann. 1076, 10 So. 183; Martin v. State, 71 Miss. 87, 14 So. 530.

⁷ Lee Tong, In re, 18 Fed. 253; State v. Quaid, 43 La. Ann. 1076, 10 So. 183; Wortham v. State, 59 Miss. 179; Harris v. White, 81 N. Y. 539; State v. Smith, Melgs (Tenn.) 99, 33 Am. Dec. 132; but see under Iowa statute, State v. Miller, 53 Iowa 154, 4 N. W. 900.

⁸ State v. Smith, Melgs (Tenn.) 99, 33 Am. Dec. 132; Hickerson v. Benson, 8 Mo. 11, 40 Am. Dec. 118; State v. Henderson, 47 Ind. 127; M'Hattan v. Bates, 4 Blackf. (Ind.)

63; but see, Frazee v. State, 58 Ind. 8; Sharkey v. State, 33 Miss. 353; Commonwealth v. Wells, 110 Pa. St. 463, 1 Atl. 310.

⁹ State v. Rorie, 23 Ark. 726; Cheek v. Commonwealth, 79 Ky. 359; Commonwealth v. Shelton, 8 Gratt. (Va.) 592.

¹⁰ Stone v. Clay, 10 C. C. A. 147, 61 Fed. 889; Cheesum v. State, 8 Blackf. (Ind.) 332, 44 Am. Dec. 771; State v. Shaw, 39 Minn. 153, 39 N. W. 305; Edwards v. State, 8 Lea (Tenn.) 411.

¹¹ Harris v. State, 31 Ala. 362.

¹² Neal v. Commonwealth, 22 Gratt. (Va.) 917, 919.

¹³ Commonwealth v. Goding, 3 Metc. (Mass.) 130.

¹⁴ Mace v. State, 58 Ark. 79, 22 S. W. 1108; People v. Weithoff, 51 Mich. 203, 209, 212, 16 N. W. 442, 47 Am. R. 557.

¹⁵ State v. DeBoy, 117 N. Car. 702, 23 S. E. 167; Jones v. State, 26 Ala. 155.

¹⁶ Miller v. State, 48 Ala. 122.

¹⁷ Underhill Cr. Ev., § 471.

these things would be held to be gambling in all jurisdictions. Much depends upon the particular statutes.

§ 3000. **The wager or stake.**—The prosecution must prove that a bet or wager was made, whether the game be one of chance or skill,¹⁸ and that the stake had some value intrinsically, or, by agreement of the parties, represented value.¹⁹ But if the defendant made the wager it is not essential that he should have been one of the players of the game where the statute prohibits wagering or betting on such a game,²⁰ and the amount and character of the things wagered are immaterial.²¹ Thus, it may be for chips or checks,²² to determine who shall treat or for the price of refreshments,²³ or, in some jurisdictions, for the hire of the table or the like.²⁴ But the contrary has been held in some jurisdictions as to playing merely where the loser is to pay for the use of the table.²⁵ The wager may be inferred from an offer and acceptance, and neither of these need be proved to have been made in express terms, but may be inferred from conduct and circumstances.²⁶ Thus, it “may be inferred by the jury from evidence that the accused placed money or chips upon a table where a game was in progress, without objection from other players,²⁷ or stated he would

¹⁸ *Middaugh v. State*, 103 Ind. 78, 80, 2 N. E. 292; *Jackson v. State*, (Tex. Cr. App.) 25 S. W. 773.

¹⁹ *Oder v. State*, 26 Fla. 520, 522, 7 So. 856; *State v. Bishel*, 39 Iowa 42.

²⁰ See, *Bone v. State*, 63 Ala. 185; *Flynn v. State*, 34 Ark. 441; *Quarles v. State*, 5 Humph. (Tenn.) 561; *Commonwealth v. Shelton*, 8 Gratt. (Va.) 592.

²¹ *Marston v. Commonwealth*, 18 B. Mon. (Ky.) 485; *Walton v. State*, 14 Tex. 381; *Cain v. State*, 13 Smed. & M. (Miss.) 456; *Hitchins v. People*, 39 N. Y. 454; *Ford v. State*, (Miss.) 38 So. 229.

²² *Porter v. State*, 51 Ga. 300, 301; *Ransom v. State*, 26 Fla. 364, 7 So. 860.

²³ *State v. Wade*, 48 Ark. 77, 51 Am. R. 560; *People v. Cutler*, 28 Hun (N. Y.) 465, 466; *Hitchins v. State*, 39 N. Y. 454; *Walker v. State*,

2 Swan. (Tenn.) 287, 290, 291; *Commonwealth v. Taylor*, 14 Gray (Mass.) 26; *Brown v. State*, 49 N. J. L. 61, 7 Atl. 340.

²⁴ *Hall v. State*, (Tex. Cr. App.) 34 S. W. 122; *Alexander v. State*, 99 Ind. 450, 451; *Hamilton v. State*, 75 Ind. 586, 587; *Bachellor v. State*, 10 Tex. 258, 261; *State v. Book*, 41 Iowa 550, 20 Am. R. 609; *Ward v. State*, 17 Ohio St. 32.

²⁵ *Harbaugh v. People*, 40 Ill. 294; *State v. Quaid*, 43 La. Ann. 1076, 10 So. 183; *State v. Hall*, 32 N. J. L. 158, 165; *People v. Forbes*, 52 Hun (N. Y.) 30, 22 N. Y. St. 278, 4 N. Y. S. 757; *Blewett v. State*, 34 Miss. 606.

²⁶ *Emmons v. State*, 34 Tex. Cr. App. 98, 29 S. W. 474, 475; *State v. Welch*, 7 Port. (Ala.) 463.

²⁷ *Thompson v. State*, 99 Ala. 173, 13 So. 753.

pay the amount wagered after the game was ended,³⁸ and even from evidence that the accused was sitting and playing at a table upon which money and gambling devices, such as cards and a faro box, were lying."³⁹ But it has been held that a charge of winning an article of value upon a game or wager is not sustained by evidence merely to the effect that the defendant played a game of pool with another and that the latter lost the game and paid for it.⁴⁰

§ 3001. Publicity of the game.—Publicity must be shown in prosecutions under some of the statutes. It has been held that the court cannot take notice that certain places are public, under a statute which forbids gambling in public places.⁴¹ Whether a game or sport is public, is usually a question for the jury to determine from the circumstances, but much depends upon the meaning of that term as used in the particular statute. "Evidence that a game was carried on in a shop,⁴² or public road,⁴³ in the office of a physician,⁴⁴ magistrate,⁴⁵ or broker,⁴⁶ aboard a steamer in a navigable stream,⁴⁷ or in a barn,⁴⁸ will sustain an allegation that a game was played in public."⁴⁹ So, evidence that it was carried on in the jury room in a court house,⁴⁰ in a road or path in common use,⁴¹ or the like,⁴² has been held sufficient. But in other cases, places similar in most respects to some of those mentioned have been held not to be public within the meaning of the statute.⁴³

³⁸ *State v. Leicht*, 17 Iowa 28.

³⁹ *Underhill Cr. Ev.*, § 473; *State v. Andrews*, 43 Mo. 470, 471; *State v. Boyer*, 79 Iowa 330, 44 N. W. 558; *St. Louis v. Sullivan*, 8 Mo. App. 455, 457, 458; *Cohen v. State*, 17 Tex. 142. Evidence that other persons, present with the accused in the room where gambling is alleged to have taken place, were playing or betting, is relevant; and perhaps indispensable, as the defendant could not play a game alone or bet with himself. *Thompson v. State*, 99 Ala. 173, 13 So. 753, 754.

⁴⁰ *Middaugh v. State*, 103 Ind. 78, 2 N. E. 292.

⁴¹ *Grant v. State*, 33 Tex. Cr. App. 527, 27 S. W. 127.

⁴² *Bentley v. State*, 32 Ala. 596.

⁴³ *Mills v. State*, 20 Ala. 86.

⁴⁴ *Williams v. State*, (Tex.) 34 S. W. 271; *Redditt v. State*, 17 Tex. 610.

⁴⁵ *Burnett v. State*, 30 Ala. 19.

⁴⁶ *Wilson v. State*, 31 Ala. 371.

⁴⁷ *Dickey v. State*, 68 Ala. 508.

⁴⁸ *Huffman v. State*, 29 Ala. 40.

⁴⁹ *Underhill Cr. Ev.*, § 473; *Nuckols v. State*, 109 Ala. 2, 19 So. 504; see also, *Downey v. State*, 110 Ala. 99, 20 So. 439; *Gomprecht v. State*, 36 Tex. Cr. App. 434, 37 S. W. 734.

⁴⁰ *Wilcox v. State*, 26 Tex. 145.

⁴¹ *Mills v. State*, 20 Ala. 86; *Henderson v. State*, 59 Ala. 89.

⁴² *Langrish v. Archer*, L. R. 10 Q. B. 44, 15 Cox Cr. Cas. 194; *Skinner v. State*, 30 Ala. 524; *Dennis v. State*, 139 Ala. 109, 35 So. 651.

⁴³ *Windsor v. Commonwealth*, 4 Leigh (Va.) 680; *McCauley v. State*,

§ 3002. Manner of playing—Expert evidence.—The courts will not, as a general rule, take judicial notice of the character of a particular game and the manner in which it is played,⁴⁴ and a jury cannot well be presumed to know how an unlawful game is played. But where the game is specifically prohibited by statute, the courts will usually take judicial notice of the meaning of the terms used, or the unlawful nature of such games.⁴⁵ The manner of playing may be explained to the jury by professional players as expert witnesses.⁴⁶ But such testimony is not indispensable. Any witness may describe a game he has seen, though he has played or seen it played only a few times.⁴⁷ The extent of his knowledge and experience goes to the weight of his testimony rather than to his competency, and is relevant to lessen or increase the weight of his evidence.⁴⁸ But it has been held that a book on such games is not admissible, although a witness could use it to illustrate his testimony.⁴⁹

§ 3003. Statutes as to prima facie evidence.—Statutes exist in many states declaring that certain facts shall be prima facie evidence of gaming or keeping or renting a house for the purpose of gaming. Such statutes have generally been upheld as constitutional.⁵⁰ Thus, a statute declaring that the fact of gaming being carried on in the house,

26 Ala. 135; *Burdine v. State*, 25 Ala. 60; *Clarke v. State*, 12 Ala. 492; *Bledsoe v. State*, 21 Tex. 223; see also, *State v. Kyer*, (W. Va.) 46 S. W. 694.

⁴⁴ *Commonwealth v. Monarch*, 6 Bush (Ky.) 298; *State v. Sellner*, 17 Mo. App. 39.

⁴⁵ *Lohman v. State*, 81 Ind. 15; *State v. Burton*, 25 Tex. 420; *State v. Price*, 12 Gill & J. (Md.) 260.

⁴⁶ *Commonwealth v. Adams*, 160 Mass. 310, 35 N. W. 581; *Hall v. State*, 6 Baxt. (Tenn.) 522; *State v. Behan*, (La.) 37 So. 607.

⁴⁷ *Nuckolls v. Commonwealth*, 32 Gratt. (Va.) 884; see also, *Hall v. State*, 6 Baxt. (Tenn.) 522; *People v. Gosset*, 93 Cal. 641, 645, 29 Pac. 246; *Miller v. Commonwealth*, 25 Ky. L. R. 1236, 1931, 77 S. W. 682, 79 S. W. 250.

⁴⁸ In one case it was held that a witness may testify he saw the defendant conduct a game for money, describing it in detail, and that another witness may then state it was a certain game, though the latter may have seen the game played only a few times. *People v. Sam Lung*, 70 Cal. 515, 11 Pac. 673; but see, *People v. Gosset*, 93 Cal. 641, 29 Pac. 246; *People v. Carroll*, 80 Cal. 153, 22 Pac. 129.

⁴⁹ *People v. Gosset*, 93 Cal. 641, 29 Pac. 246.

⁵⁰ *Voght v. State*, 124 Ind. 358, 24 N. E. 680; *Commonwealth v. Smith*, 166 Mass. 370, 44 N. E. 503; *People v. Adams*, 176 N. Y. 351, 68 N. E. 636, 63 L. R. A. 406, aff'd in, 192 U. S. 585, 24 Sup. Ct. 372.

and knowledge thereof on the part of the lessee or owner without taking any steps to prevent it, shall constitute sufficient evidence that it was rented for such purpose, has been held constitutional.⁵¹ So, a statute proving that if any of the implements, devices or apparatus commonly used in games of chance usually played in gambling houses, or by gamblers, are found in the house, it shall be *prima facie* evidence that such house is kept for gaming, has been held constitutional.⁵²

§ 3004. Circumstantial evidence—Other offenses.—Circumstantial as well as direct evidence is admissible in prosecutions under the various gaming statutes, and, indeed, it often happens that the guilt of the accused can be shown in no other way.⁵³ Other offenses, such as gambling in the place in question at other times or the like, may be shown upon the question of knowledge and intent, design or purpose for which the establishment is kept, and to illustrate its nature.⁵⁴ Thus, it is held in a recent case that in the trial of a prosecution for keeping a banking game, the state may prove that the defendant dealt *faro* in the same place within two weeks immediately preceding the date charged in the information, for the purpose of showing the character of the house and the guilty knowledge of defendant.⁵⁵ It is not necessary to prove a winning or losing by direct evidence of actual observation, but gaming may be inferred from circumstances,⁵⁶ and it has been held that evidence that persons with money and “chips” on a table before them behaved in the manner of persons engaged in a well-known gambling game will justify their conviction for gaming.⁵⁷ So, evidence that the room in which gambling was conducted and in

⁵¹ *Morgan v. State*, 117 Ind. 569, 17 N. E. 154.

⁵² *Wooten v. State*, 24 Fla. 335, 1 L. R. A. 819.

⁵³ See, *State v. Boyer*, 79 Iowa 330, 44 N. W. 558; *State v. Andrews*, 43 Mo. 470; *St. Louis v. Sullivan*, 8 Mo. App. 455; *Robbins v. People*, 95 Ill. 175; *Hamilton v. State*, 75 Ind. 586; *McAlpin v. State*, 3 Ind. 567.

⁵⁴ *Toll v. State*, 40 Fla. 169, 23 So. 942; *Commonwealth v. Ferry*, 146 Mass. 203, 209, 15 N. E. 484; *State v. Czarnikow*, 20 Ark. 160; see also, as to lotteries, *Dunn v. People*, 40

Ill. 465, 469; *Miller v. Commonwealth*, 13 Bush (Ky.) 737; *Clark v. State*, 47 N. J. L. 556, 4 Atl. 327.

But, otherwise, the general rule applies that independent offense cannot be shown. *Wickard v. State*, 109 Ala. 45, 19 So. 491; *Goldstein v. State*, (Tex. Cr. App.) 35 S. W. 289.

⁵⁵ *State v. Behan*, (La.) 37 So. 607.

⁵⁶ *McAlpin v. State*, 3 Ind. 567; *Voght v. State*, 124 Ind. 358, 24 N. E. 680; *Hamilton v. State*, 75 Ind. 586.

⁵⁷ *Neeld v. State*, 25 Ind. App. 603, 58 N. E. 734. But see *Fallwell v. State*, (Tex. Cr. App.) 85 S. W. 1069.

which the defendant stored goods was connected with the main room of the building which the defendant leased for his store; that a door opened from the store into the room, of which the defendant alone had the key; that he opened it when requested; that it was necessary to ask permission of him to enter; was sufficient to show that defendant was the lessee and occupant of the room, within the Mississippi statute, forbidding owners, lessees, or occupants of any building to permit gaming to be carried on therein.⁵⁸

§ 3005. Gambling instruments in evidence.—Gambling instruments and devices employed in playing illegal games are admissible, if properly identified and connected with the accused.⁵⁹ As shown in another section, they are sometimes made prima facie evidence by statute. So, by statute in some jurisdictions the seizure of articles used for gambling purposes, as tables, cards, and the like, is authorized.⁶⁰ It is generally held that they cannot be confiscated or destroyed without due notice to their owner and an opportunity for him to be heard and to prove their lawful character in judicial proceedings,⁶¹ but the method by which the prosecution has acquired them does not prevent their use as evidence in a proper case upon the ground that the accused is protected by the constitution from being compelled to furnish evidence against himself.⁶² In a recent case, where the defendant was charged with keeping a gaming house, there was evidence that at the time of his arrest he was in possession of gambling devices, and they were held properly admitted in evidence, the court having instructed that this testimony should be considered only to show that the property in question was in defendant's possession, and that he could not be convicted on testimony that he was the keeper of the place after the time of the issuing of the warrant, or on any testimony showing that the place described in the information was a gaming house after the time of issuing the warrant.⁶³ But on a prosecution under the New York stat-

⁵⁸ *Ford v. State*, (Miss.) 38 So. 229. (Neb.) 99 N. W. 505, 65 L. R. A.

⁵⁹ *People v. Sam Lung*, 70 Cal. 515, 610.
517, 11 Pac. 673.

⁶⁰ *Ridgeway v. West*, 60 Ind. 371;
Commonwealth v. Gaming Imple-
ments, 119 Mass. 332, 65 L. R. A.
611, 616.

⁶¹ *State v. Robbins*, 124 Ind. 308,
24 N. E. 978; *Lowry v. Rainwater*,
70 Mo. 152; *McConnell v. McKillip*,

⁶² *Commonwealth v. Smith*, 166
Mass. 370, 44 N. E. 503; *State v.*
Pomeroy, 130 Mo. 489, 32 S. W. 1092;
see also, *Woods v. Cottrell*, 55 W. Va.
476, 47 S. E. 275, 65 L. R. A. 616.

⁶³ *State v. Harmon*, (Kans.) 78
Pac. 805.

ute for receiving and recording money on a bet on a horse race, where the prosecuting witness testified that at the place where the offense occurred there were placards on the wall stating the name of the horses which were to compete in certain races, it was held that placards taken from defendant at the time of his arrest, containing what might be inferred to be the names of race horses, were not admissible against the defendant, without proof as to whether the cards were used or to be used upon a race course, even though they were similar to the placards on the wall of the alleged poolroom, and were intended to be used in the registration of bets.⁶⁴

§ 3006. Accomplices and accessories.—The question as to whether a conviction may be had in criminal cases upon the uncorroborated evidence of an accomplice or accessory has already been considered. But the rules governing such evidence in gambling cases depend largely upon the statute in the particular jurisdiction. Thus, in some jurisdictions a conviction may be had upon the uncorroborated evidence of an accomplice,⁶⁵ and under some statutes he is not to be excused from testifying because his evidence may tend to incriminate him,⁶⁶ where he is granted immunity therefrom. But in some other jurisdictions there are or have been statutes providing that no conviction shall be had on the uncorroborated testimony of an accomplice.⁶⁷

§ 3007. Variance.—It is not essential, as a rule, that the state should prove that the offense was committed on the precise date charged.⁶⁸ But it must be shown to have been committed before the indictment and within the period of limitations.⁶⁹ It is not necessary to prove that all the money or property charged in the indictment was

⁶⁴ *People v. Ebel*, 98 App. Div. (N. Y.) 270, 90 N. Y. S. 628. There was no evidence, however, of the latter fact.

⁶⁵ *Wright v. State*, 22 Tex. App. 670, 3 S. W. 346.

⁶⁶ *Cheesum v. State*, 8 Blackf. (Ind.) 332, 44 Am. Dec. 771; *Warner v. State*, 13 Lea (Tenn.) 52; *Kneeland v. State*, 62 Ga. 396; *Kendrick v. Commonwealth*, 78 Va. 490; see, *Moore v. State*, 97 Ga. 759, 25 S. E. 362.

⁶⁷ *Davidson v. State*, 33 Ala. 350; *State v. Light*, 17 Ore. 358, 21 Pac. 132.

⁶⁸ *State v. Czarinkow*, 20 Ark. 160; *Cohen v. State*, 32 Ark. 226; *Robinson v. State*, 77 Ga. 101; *Spratt v. State*, 8 Mo. 247; *Ramey v. State*, 14 Tex. 409; see also, *Dennis v. State*, 139 Ala. 109, 35 So. 651.

⁶⁹ *Winans v. State*, (Tex. App.) 19 S. W. 676; *State v. Waters*, 1 Strob. (S. Car.) 59; see also, *Cochran v. State*, 30 Ala. 542.

lost or won,⁷⁰ but it must generally be shown that some money, article, or thing of the kind charged was wagered or won or lost.⁷¹ It has been held that a charge that the defendant lost money on a wager is not supported by evidence that he and another lost a joint bet,⁷² and the same court has held that where the charge is that the defendant lost a bet with two or more persons, evidence that the winning or losing was by the defendant alone and with only one of such persons is insufficient.⁷³ But under a charge of keeping a room for gaming it has been held that the names of the persons who gambled therein were immaterial.⁷⁴

§ 3008. Common gamblers.—In some of the states frequenting gaming houses is a criminal offense, and statutes exist for the punishment of those who habitually frequent gaming houses, or engage in gambling as a livelihood, as common gamblers. It has been held under such a statute that the evidence must show that the defendant engaged in gambling in the county where he was indicted, and that evidence that he had earned his living by gambling at other places is not sufficient if the evidence shows that he came on lawful business into the county where he is being prosecuted, and does not show the commission or attempt to commit any unlawful act there.⁷⁵ Evidence of a single visit to a gambling house is generally insufficient to sustain a conviction on the charge of frequenting a place where gambling is permitted.⁷⁶ But it seems that it may be sufficient in some cases, along with other evidence or under particular circumstances.⁷⁷ The evidence

⁷⁰ *Parsons v. State*, 2 Ind. 499; *Alexander v. State*, 99 Ind. 450; *Bishop Stat. Cr.*, §§ 898, 899.

⁷¹ *Tate v. State*, 5 Blackf. (Ind.) 174; *Horton v. State*, 13 Ark. 62; *Williams v. State*, 12 Smed. & M. (Miss.) 58; *Bishop Stat. Cr.*, § 901; as to proving the particular device alleged, see, *Pemberton v. State*, 85 Ind. 507; see also, *Commonwealth v. Coleman*, 184 Mass. 198, 68 N. E. 220; *Commonwealth v. Hodgkins*, 170 Mass. 197, 49 N. E. 97.

⁷² *Jackson v. State*, 4 Ind. 560; *Wilcox v. State*, 7 Blackf. (Ind.) 456; in one case where a written memorandum of a bet was made parol evidence of its contents was

held inadmissible without accounting for the absence of the writing. *Frazee v. State*, 58 Ind. 8.

⁷³ *Iseley v. State*, 8 Blackf. (Ind.) 403; see also, *Hany v. State*, 4 Eng. (Ark.) 193.

⁷⁴ *State v. Dole*, 3 Blackf. (Ind.) 294; for variance in the description of the building held not to be fatal, see, *Commonwealth v. Coleman*, 184 Mass. 198, 68 N. E. 220.

⁷⁵ *Bowe v. State*, 25 Ind. 415.

⁷⁶ *Green v. State*, 109 Ind. 175, 9 N. E. 781; *De Haven v. State*, 2 Ind. App. 376, 28 N. E. 562.

⁷⁷ *Commonwealth v. Hopkins*, 2 Dana (Ky.) 418.

should show that the defendant frequented the house for the purpose of gambling.⁷⁸ Proof that he actually gambled while he was there is evidence of his purpose in frequenting the place.⁷⁹ But when the fact that he frequented it and his purpose in doing so are otherwise proved, it is not necessary to prove that the defendant actually engaged in gambling.⁸⁰ His purpose of gaming may be inferred from circumstances,⁸¹ and evidence that during the period in question he visited and gambled with cards at other gaming houses in the same neighborhood has been held admissible as tending to prove his purpose in visiting the particular gambling house.⁸² It has also been held that a man may be convicted of being a common gambler upon evidence that he followed that occupation in a room kept by himself, although it is also proved that he has previously been convicted of keeping a gambling room at such place.⁸³ But it has been held that one cannot be convicted of being a common gambler on mere evidence of his reputation as such.⁸⁴

§ 3009. Keeping gambling house.—Keeping a common gaming house was a criminal offense at common law, and it is now a statutory offense in most jurisdictions. Some of these statutes are far more comprehensive than the common law. Evidence that the defendant had actual custody or possession of a public gambling house, or that he derived gain or profit from it, is relevant and may justify an inference that he was keeping it in the statutory sense.⁸⁵ It has been said that proof of a single act of possession or supervision may not be enough to sustain a conviction of keeping, for the offense is continuous.⁸⁶ But under many of the statutes no particular time is required, and so keeping it for a single day or part of a day may be sufficient.⁸⁷

⁷⁸ Howard v. State, 64 Ind. 516; De Haven v. State, 2 Ind. App. 376, 28 N. E. 562.

⁷⁹ Howard v. State, 64 Ind. 516.

⁸⁰ Green v. State, 109 Ind. 175, 9 N. E. 781; Howard v. State, 64 Ind. 516.

⁸¹ Howard v. State, 64 Ind. 516.

⁸² Courtney v. State, 5 Ind. App. 356, 32 N. E. 335.

⁸³ De Haven v. State, 2 Ind. App. 376, 28 N. E. 562.

⁸⁴ Commonwealth v. Hopkins, 2 Dana (Ky.) 418.

⁸⁵ Lettz v. State, (Tex. Cr. App.) 21 S. W. 371; Harman v. State, (Tex. Cr. App.) 22 S. W. 1038; Wren v. State, 70 Ala. 1; Robbins v. People, 95 Ill. 175; Commonwealth v. Clancy, 154 Mass. 128, 27 N. E. 1001; Douglass v. State, 18 Ind. App. 289, 48 N. E. 9.

⁸⁶ Underhill Cr. Ev., § 475; United States v. Smith, 4 Cranch (U. S.) 659; Jessup v. State, 14 Ind. App. 230, 42 N. E. 948; contra, State v. Crogan, 8 Iowa 523, 524.

⁸⁷ State v. Cooster, 10 Iowa 453;

It has been held that the particular game which was played need not be alleged⁸⁸ or proved.⁸⁹ It has also been said that the reputation of the house as a gambling or disorderly house is incompetent.⁹⁰ But it may be admissible in some cases to show knowledge or the like,⁹¹ and the reputation of those who frequent the house as being gamblers may be shown,⁹² and so, in some cases, may their conduct and declarations.⁹³ Specific acts of gambling have been held admissible in evidence to prove the keeping of a gambling house,⁹⁴ and evidence denying that such acts were committed is also competent.⁹⁵ It is not necessary to directly prove a winning or losing from actual observation, but gaming and the keeping of the place for that purpose may be inferred from circumstances.⁹⁶ Some evidence that the defendant knew that gambling was carried on in his house or room is generally necessary to sustain a conviction,⁹⁷ but it has been held that his knowledge that it was used for gaming may be inferred from proof that it was generally reputed to be used as a gambling room, that the tenant had pleaded guilty to a charge of keeping a gaming establishment in such room, and that the defendant collected his own rent from other tenants in the same building and neighborhood, and mingled with the citizens of the community.⁹⁸ Evidence that gaming was regularly permitted upon tables in defendant's saloon, which belonged to him, of which his bar-

State v. Markham, 15 La. Ann. 498; *McAlpin v. State*, 3 Ind. 567; *Armstrong v. State*, 4 Blackf. (Ind.) 247.

⁸⁸ *State v. Dole*, 3 Blackf. (Ind.) 294.

⁸⁹ *Commonwealth v. Lampton*, 4 Bibb. (Ky.) 261; *State v. Dole*, 3 Blackf. (Ind.) 294. But it has been held that when alleged it must be strictly proved. *Dudney v. State*, 32 Ark. 251, 252.

⁹⁰ *Wharton Cr. Ev.*, § 260.

⁹¹ *Voght v. State*, 124 Ind. 358, 24 N. E. 680.

⁹² *State v. Mosby*, 53 Mo. App. 571; *Anderson v. State*, (Tex. App.) 12 S. W. 868. But the contrary has been held as to reputation of the defendant. *Lettz v. State*, (Tex. Cr. App.) 21 S. W. 371.

⁹³ *Bindernagle v. State*, 60 N. J. L.

307, 37 Atl. 619; see also, *Lowe v. State*, 86 Ala. 47, 5 So. 435.

⁹⁴ *Armstrong v. State*, 4 Blackf. (Ind.) 247; *Gaylor v. McHenry*, 15 Ind. 383; *Stefani v. State*, 124 Ind. 3, 24 N. E. 254.

⁹⁵ *Stefani v. State*, 124 Ind. 3, 6, 24 N. E. 254.

⁹⁶ *Simms v. State*, 60 Ga. 145; *Cox v. State*, 95 Ga. 502, 20 S. E. 269; *State v. Boyer*, 79 Iowa 330, 44 N. W. 558; *Commonwealth v. Adams*, 160 Mass. 310, 35 N. E. 851; *Robbins v. People*, 95 Ill. 175; *McAlpin v. State*, 3 Ind. 567; *Hamilton v. State*, 75 Ind. 586; *Voght v. State*, 124 Ind. 358, 24 N. E. 680; *Neeld v. State*, 25 Ind. App. 603, 58 N. E. 734.

⁹⁷ *Padgett v. State*, 68 Ind. 46; *Harris v. State*, 5 Tex. 11.

⁹⁸ *Voght v. State*, 124 Ind. 358, 24 N. E. 680; see also, *State v. Hand*, 7 Iowa 411.

keeper had charge, and that defendant was frequently present in the saloon during a period of two years, although inattentive, but able to see what was going on if he chose, is sufficient to justify his conviction for permitting his house to be used for gambling.⁹⁹ His presence in the room at any time is not an essential element in the offense of keeping a gaming house,¹⁰⁰ but evidence that a gambling room in charge of another person was situated over defendant's saloon, in a rented building, from which it could be reached by a stairway, and that persons reached it by passing through his saloon, has been held insufficient of itself to prove that defendant kept the gambling room.¹⁰¹ It is generally for the jury to determine what inference shall be drawn from the facts proved,¹⁰² and whether or not the keeping of a gambling house by the defendant is proved beyond a reasonable doubt or should be inferred from the evidence.¹⁰³

§ 3010. Minors playing.—In some of the states there are specific statutes directed against gambling, and even the mere playing or permitting the playing of certain forbidden games, in certain places by minors. Proof of a wager by the minor upon the result of such a game has been held unnecessary under statutes of the latter class.¹⁰⁴ But some of the courts have been strict in requiring the proof to correspond with the charge in regard to the parties playing,¹⁰⁵ the kind of game,¹⁰⁶ and even the kind of table used.¹⁰⁷ Evidence that the defendant had the general management and control of the room and of the table on which the game was played, and that he was present and saw the minor play, has been held sufficient to sustain a charge against him for permitting a minor to play thereon, although he is not shown to have controlled and managed the table in person.¹⁰⁸ The minority of the prosecuting witness being established, together with other facts making

⁹⁹ Crawford v. State, 33 Ind. 304; Hamilton v. State, 75 Ind. 586; see also, Stoltz v. People, 5 Ill. 168; Robinson v. State, 24 Tex. 152.

¹⁰⁰ Hazen v. State, 58 Ind. 197.

¹⁰¹ Barnaby v. State, 106 Ind. 539, 7 N. E. 231; see also, Commonwealth v. Dean, 1 Pick. (Mass.) 387; Scott v. State, 29 Ga. 263.

¹⁰² Voght v. State, 124 Ind. 358, 24 N. E. 680.

¹⁰³ Bindernagle v. State, 60 N. J. L. 307, 37 Atl. 619; Brown v. State, 49

N. J. L. 61, 7 Atl. 340; Campbell v. State, 55 Ala. 89; Winemiller v. State, 11 Ind. 516; Hamilton v. State, 75 Ind. 586.

¹⁰⁴ Ready v. State, 62 Ind. 1; Bond v. State, 52 Ind. 457.

¹⁰⁵ Moore v. State, 65 Ind. 214.

¹⁰⁶ Squire v. State, 66 Ind. 317; Sumner v. State, 74 Ind. 52.

¹⁰⁷ Bartender v. State, 51 Ind. 73, 76.

¹⁰⁸ Hipes v. State, 73 Ind. 39.

out a *prima facie* case, it has been held that the defendant has the burden of proof to show that he acted in good faith under an honest belief, which was justified by the appearance of the minor and other facts within defendant's knowledge that the minor was of full age.¹⁰⁹ But it has been held that the state must show the guardian's want of consent where that is an essential element of the offense.¹¹⁰

§ 3011. Lotteries.—Lotteries constitute a species or kind of gaming.¹¹¹ Laws against lotteries and providing, under certain circumstances and proceedings, for the seizure of lottery tickets and the like have very generally been upheld as constitutional.¹¹² It has also been held that the court will take judicial notice of the meaning of the term "gift enterprise" as a scheme for the division or distribution of articles, to be determined by chance, among those who have taken shares in the scheme.¹¹³ On the trial of an indictment for selling lot-

¹⁰⁹ *Taylor v. State*, 107 Ind. 483, 8 N. E. 450; *Swigart v. State*, 99 Ind. 111.

¹¹⁰ *Conyers v. State*, 50 Ga. 103, 106, 107. It has been held that the accused may show in such case that he used care to ascertain the age of the player, and for this purpose may prove facts descriptive of his personal appearance and his replies to questions put to him. *Stern v. State*, 53 Ga. 229; *Goetz v. State*, 41 Ind. 162; see also, *Commonwealth v. Emmons*, 98 Mass. 6.

¹¹¹ *Bishop Stat. Cr.*, § 951; *Thomas v. People*, 59 Ill. 160; *Bell v. State*, 5 Sneed (Tenn.) 507; for definition of the term see, *Bishop Stat. Cr.*, § 951, and the opinion in, *United States v. Olney*, 1 Abb. (U. S.) 275, where several definitions are quoted and commented on. See also, *State v. Kansas &c. Co.*, 45 Kans. 351, 23 Am. St. 727; *Yellowstone Kit v. State*, 88 Ala. 196, 16 Am. St. 38; *State v. Bonell*, 42 La. Ann. 1110, 8 So. 298, 21 Am. St. 413; *People v. Elliott*, 74 Mich. 264, 41 N. W. 916, 3 L. R. A. 403, and note; also notes in, 7 L. R. A. 799; 8 L. R.

A. 671, and 10 L. R. A. 60; *Lynch v. Rosenthal*, 144 Ind. 86, 90, 42 N. E. 1103, 55 Am. St. 171. The authorities and notes treat very fully the question as to what are or are not lotteries, and furnish many examples and illustrations.

¹¹² See, *Stone v. Mississippi*, 101 U. S. 814; *Boyd v. Alabama*, 94 U. S. 645; *Commonwealth v. Dana*, 2 Metc. (Mass.) 329; *Salomon v. State*, 27 Ala. 26; *People v. Noelke*, 94 N. Y. 137, 46 Am. R. 128 (forbidding sale of tickets, although the lottery is in another state in which it is lawful); *Wong Hane, In re*, 108 Cal. 680, 41 Pac. 693, 49 Am. St. 138; *Commonwealth v. Gorman*, 164 Mass. 549, 42 N. E. 94; *Ford v. State*, 85 Md. 465, 60 Am. St. 337. In several of these cases statutes making it unlawful or at least *prima facie* evidence of guilt to have lottery tickets in possession were upheld.

¹¹³ *Lohman v. State*, 81 Ind. 15; see also as to the meaning of this term, *Winston v. Beeson*, 135 N. Car. 271, 47 S. E. 457, 65 L. R. A. 167, and authorities cited.

tery tickets, it has been held that they should be produced unless good cause is shown for not producing them.¹¹⁴ Printed envelopes for such tickets and handbills advertising them, found on the defendant's desk or counter and bearing his name, are competent evidence against him.¹¹⁵ Evidence of the sale of "policies" has also been held admissible under an indictment for selling lottery tickets,¹¹⁶ and it has been held that although the alleged lottery ticket set out in the indictment is not clearly such a ticket upon its face, it may be averred and proved to be such.¹¹⁷ And evidence that the defendant sold a ticket or paper bearing certain numbers representing the purchaser's title to a prize to be drawn by such numbers in a lottery, or game of chance in the nature of a lottery, has been held sufficient to support a conviction.¹¹⁸

¹¹⁴ *Whitney v. State*, 10 Ind. 404.

¹¹⁷ *State v. Willis*, 78 Me. 70, 2 Atl.

¹¹⁵ *Dunn v. People*, 40 Ill. 465; see 848.
also, *Collins v. Lean*, 68 Cal. 284,
9 Pac. 173.

¹¹⁶ *State v. Rothschild*, 19 Mo. App.
137.

¹¹⁸ *Smith v. State*, 68 Md. 168, 11
Atl. 758.

CHAPTER CXLV.

HOMICIDE.

Sec.	Sec.
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3014. Presumptions—As to intent.	3033. Dying declarations—When not admissible.
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3027. Means used and cause of death.	3045. Evidence in general—Not admissible.
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§ 3012. Definition and classification.—Homicide in the most comprehensive meaning of the term is the killing of any human being.¹ It is the killing of one human being by another human being. “The term, in its largest sense,” says Chief Justice Shaw, “is generic, embracing every mode by which the life of one man is taken by the act

¹ Standard Dict.; 1 Bouvier L. Dict. (Rawle's ed.) 958.

of another. Homicide may be lawful or unlawful; it is lawful when done in lawful war upon an enemy in battle; it is lawful when done by an officer in the execution of justice upon a criminal, pursuant to a proper warrant. It may also be justifiable, and of course lawful, in necessary self-defense. By the existing law, as adopted and practiced on, unlawful homicide is distinguished into murder and manslaughter. Murder, in the sense in which it is now understood, is the killing of any person in the peace of the commonwealth, with malice aforethought, either express, or implied by law. Malice, in this definition, is used in a technical sense, including not only anger, hatred and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will toward one or more individual persons, but it is intended to denote an action flowing from any wicked and corrupt motive, a thing done with *malo animo*, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate or cruel act against another, however sudden. Manslaughter is the unlawful killing of another without malice; and may be either voluntary, as when the act is committed with a real design and purpose to kill, but through the violence of sudden passion, occasioned by some great provocation, which in tenderness for the frailty of human nature the law considers sufficient to palliate the criminality of the offense; or involuntary, as when the death of another is caused by some unlawful act not accompanied by any intention to take life."² Murder is also divided by statute in many jurisdictions into murder in the first degree and murder in the second degree. Unlawful or criminal homicide, such as we have to do with in this chapter, may, therefore, be murder in the first degree, murder in the second degree, or manslaughter.³

§ 3013. **Presumption of innocence.**—The presumption of innocence is one of the most important of all presumptions. It has its place in civil actions, but it is particularly applicable in prosecutions for crime; and in no class of cases, perhaps, is it more important than in prosecutions for murder or manslaughter. The accused starts out

² Commonwealth v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711, 716, 717, and note; see also, 1 Russell Crimes 421; 1 Hale P. C. 466; 1 East P. C. 218.

³ See, 18 Am. Dec. 774, note; 2 Bouvier L. Dict. (Rawle's ed.) 459, 460; 1 McClain Cr. Law, § 335.

with this presumption in his favor, and the burden remains upon the prosecution, according to the better view, to ultimately establish his guilt beyond a reasonable doubt.⁴ It is also said, in some cases and by some writers, that this presumption operates and is to be weighed as evidence in his favor throughout the trial, but, as elsewhere shown, this doctrine seems questionable.⁵ It has been held that the presumption of innocence is no stronger where the relation between the accused and the deceased was that of parent and child, husband and wife, or the like,⁶ and, in a strict sense, this would seem to be correct, but the opposite view seems to have been taken in some cases.⁷

§ 3014. Presumptions—As to intent.—An intent to kill may, of course, be inferred from circumstantial evidence, and it is sometimes said that such an intent is presumed from the act of killing by using a deadly weapon or the like because one is presumed to intend the actual consequences of his act.⁸ Thus it has been held that an intent to kill by striking a mortal blow may be presumed from the circumstances of the killing.⁹ But a presumption of intention cannot arise from the previous character of the prisoner, for his intentions can only be determined by his acts.¹⁰ A presumption of intent to commit murder has been held to arise from the defendant's act of shooting into a crowd, because every man is supposed to

⁴ *Ogletree v. State*, 28 Ala. 693; *Bird v. State*, 43 Fla. 541, 30 So. 655; *State v. Young*, 99 Mo. 666, 12 S. W. 879; *Jones v. State*, 13 Tex. App. 1; Vol. I, § 95; see also, *State v. Earnest*, 56 Kans. 31, 42 Pac. 359; *Peyton v. State*, 54 Neb. 188, 74 N. W. 597; *Gravely v. State*, 38 Neb. 871, 57 N. W. 751; *Ford v. State*, 73 Miss. 734, 19 So. 665, 35 L. R. A. 117; *State v. Hudspeth*, 159 Mo. 178, 60 S. W. 136; *Jones v. State*, 51 Ohio St. 331, 38 N. E. 79; *Wilkerson v. Commonwealth*, 25 Ky. L. R. 780, 76 S. W. 359.

⁵ See, Vol. I, §§ 92, 93, 95; *State v. Linhoff*, 121 Iowa 632, 97 N. W. 77; *People v. Moran*, 144 Cal. 48, 77 Pac. 777.

⁶ *Hawes v. State*, 88 Ala. 37, 7 So. 302; *State v. Soper*, 148 Mo. 217, 49 S. W. 1007.

⁷ *State v. Green*, 35 Conn. 203; see also, *People v. Greenfield*, 23 Hun (N. Y.) 454; *State v. Hossack*, 116 Iowa 194, 89 N. W. 1077.

⁸ *State v. Smith*, 12 Rich. L. (S. Car.) 430; *Harrison v. Commonwealth*, 79 Va. 374; *State v. Shepard*, 49 W. Va. 582, 39 S. E. 676; see also, *Weaver v. People*, 132 Ill. 536, 24 N. E. 571; *State v. Grant*, 144 Mo. 56, 45 S. W. 1102; *State v. Doyle*, 107 Mo. 36, 17 S. W. 751; *Chalk v. State*, 35 Tex. Cr. App. 116, 32 S. W. 534.

⁹ *State v. Walker*, 37 La. Ann. 560.

¹⁰ *People v. Milgate*, 5 Cal. 127.

intend the necessary consequences of his own acts.¹¹ So it has been held that where one purposely fired into a crowd without intending to kill any particular person, but did kill one, the law presumes the killing intentional.¹² And it has even been held that a presumption arises that a killing was intentional where the mere act of killing is proved, since every homicide is presumed unlawful.¹³ That is, one is presumed to intend to do that which in fact he actually does do.¹⁴ It has also been held that a presumption of intent to kill may arise where the evidence shows that, had death ensued from the assault, the crime would have been murder.¹⁵ A presumption does not arise that a certain assault was without intent to take life from the fact that the defendant had his assailant in his power, and could have killed him but did not.¹⁶ So a presumption of intent to kill may arise from the means or weapon used and the manner of its use. Thus, a presumption of intent to kill arises where a party does an act with a dangerous or deadly weapon, which, from its nature and the way it is done, would naturally, probably, or reasonably produce death.¹⁷ It has also been said that the law infers from the use of a deadly weapon an intent to kill or to do grievous bodily harm, and the presumption of malice is conclusive, unless excuse, justification, or immediate provocation are shown;¹⁸ and that killing with a deadly weapon is *prima facie* evidence that the design to kill was formed in

¹¹ *Walker v. State*, 8 Ind. 290; *Brown v. Commonwealth*, 13 Ky. L. R. 372, 17 S. W. 220; *Bailey v. State*, 133 Ala. 155, 32 So. 57; *Austin v. State*, 110 Ga. 748, 36 S. E. 52, 78 Am. St. 134; *State v. Young*, 50 W. Va. 96, 40 S. E. 334, 88 Am. St. 846.

¹² *State v. Edwards*, 71 Mo. 312; see also, notes in 63 L. R. A. 353, 660, 902.

¹³ *State v. Brown*, 12 Minn. 538; *State v. Smith*, 12 Rich. L. (S. Car.) 430; *Wilson v. State*, 69 Ga. 224; but see, *People v. Downs*, 56 Hun (N. Y.) 5, 8 N. Y. S. 521; *Connell v. State*, (Tex. Cr. App.) 81 S. W. 746. Where there has been a completed murder, the law supposes that the person intends the natural consequences of his act, and in such cases the evil intention will be presumed,

and need not be alleged, or, if alleged in the indictment, is a formal averment, which need not be proved. *Chelsey v. State*, 121 Ga. 340, 49 S. E. 258.

¹⁴ *Parrish v. State*, 14 Neb. 60, 15 N. W. 357.

¹⁵ *Cole v. State*, 10 Ark. 318.

¹⁶ *Jackson v. State*, 94 Ala. 85, 10 So. 509.

¹⁷ *Hill v. People*, 1 Colo. 436; *Moon v. State*, 68 Ga. 687; *Voght v. State*, 145 Ind. 12, 43 N. E. 1049; *State v. Gassert*, 4 Mo. App. 44; *State v. Musick*, 101 Mo. 260, 14 S. W. 212; *Henson v. State*, 112 Ala. 41, 21 So. 79; *People v. Wolf*, 95 Mich. 625, 55 N. W. 357; *Bishop v. State*, 62 Miss. 289; *Kilpatrick v. Commonwealth*, 31 Pa. St. 198.

¹⁸ *Sylvester v. State*, 72 Ala. 201.

the mind of the party committing the act, and that the killing was the consequence of such design.¹⁹ And where the accused fired a loaded pistol at one and killed him it was said that the law presumed that he intended so to do.²⁰ So, a shotgun fired within killing distance, and aimed at a vital part, there being no proof to the contrary, shows intent to kill.²¹ And a presumption of an intent to kill has been held to arise where there was an assault with a gun.²² So intent may be inferred from the deliberate use of any deadly weapon.²³ A presumption arises in the absence of other proof that an act was voluntarily done where a party without necessity kills another with a deadly weapon.²⁴ And it has been said that nothing affords more conclusive evidence of the intent to take life than the weapon used.²⁵

§ 3015. Presumptions—Not conclusive.—Some of the authorities cited in the last preceding section seem to us to go to the extreme, if not beyond. On the other hand, some courts hold that there is no necessary legal presumption of intent to kill even from the use of a deadly weapon, although it may justify an inference of such intent.²⁶ And the presumption of intent to kill, from the use of a deadly weapon or the like, is not conclusive, but may be rebutted.²⁷ It has also been held that the intent to kill may be presumed from the use of a deadly weapon only where it was deliberately used in a deadly manner.²⁸ So, it has been held that in the absence of other facts,

¹⁹ *Blvens v. State*, 11 Ark. 455.

²⁰ *People v. Langton*, 67 Cal. 427, 7 Pac. 843.

²¹ *State v. Dill*, 9 Houst. (Del.) 495, 18 Atl. 763.

²² *State v. Musick*, 101 Mo. 260, 14 S. W. 212.

²³ *Walker v. State*, 136 Ind. 663, 36 N. E. 356; *Coolman v. State*, (Ind.) 72 N. E. 568.

²⁴ *Oliver v. State*, 17 Ala. 587.

²⁵ *Commonwealth v. Green*, 1 Ash. (Pa.) 289.

²⁶ See, *Fitch v. State*, 37 Tex. Cr. App. 500, 36 S. W. 584; *Cross v. State*, 55 Wis. 261, 12 N. W. 425; *State v. McKinzie*, 102 Mo. 620, 15 S. W. 149; *State v. Tabor*, 95 Mo. 585, 8 S. W. 744; see also, *Simpson v. State*, 56 Ark. 8, 19 S. W. 99; *Dan-*

forth v. State, 44 Tex. Cr. App. 105, 69 S. W. 159; *People v. Batting*, 49 How. Pr. (N. Y.) 392; *People v. Downs*, 56 Hun (N. Y.) 5, 8 N. Y. S. 521.

²⁷ *Clem v. State*, 31 Ind. 480; *Thomas v. People*, 67 N. Y. 218; *State v. Brooks*, 1 Ohio Dec. (Reprint) 407, 9 Wkly. L. J. 109; in the first case above cited the statement in 1 Greenleaf Ev., § 18, that the presumption is conclusive is said to be a "great inaccuracy," and is severely criticised.

²⁸ *State v. Walker*, 1 Ohio Dec. (Reprint) 353, 8 Wkly. L. J. 145; *Simpson v. State*, 56 Ark. 8, 19 S. W. 99; *Cross v. State*, 55 Wis. 261, 12 N. W. 425.

the intent to kill cannot, as a matter of law, be presumed from a killing with a stick four feet long and two inches in diameter.²⁹ It has likewise been held that an intent to kill cannot be presumed from the mere fact that a pistol was discharged with criminal negligence.³⁰ So, it is generally held that where a specific intent is essential, as in prosecutions for assault with intent to murder, or the like, where death does not result, it is not presumed by the law from the mere use of a dangerous weapon or the like.³¹

§ 3016. Presumption of malice—From deliberation or want of provocation.—There is some conflict among the authorities upon the subject of the presumption of malice. It may undoubtedly be inferred, in a proper case, from the circumstances of an unlawful killing, and it is often said that in the absence of anything to the contrary the law presumes malice from such a killing,³² at least where a deadly weapon³³ is deliberately used.³⁴ Thus, it is said, that malice being a necessary ingredient of the crime of murder, the law infers it wherever the killing is deliberate and premeditated.³⁵ And it is

²⁹ *Fitch v. State*, 37 Tex. Cr. App. 500, 36 S. W. 584.

³⁰ *Bryant v. State*, 5 Wyo. 376, 40 Pac. 518; see also, *Johnson v. State*, 66 Ohio St. 59, 63 N. E. 607, 90 Am. St. 564, and note; but see, 63 L. R. A. 660, note; *Bailey v. State*, 133 Ala. 155, 32 So. 57; *Brown v. Commonwealth*, 13 Ky. L. R. 372, 17 S. W. 220.

³¹ *Morgan v. State*, 33 Ala. 413; *Lane v. State*, 85 Ala. 11, 4 So. 730; *Simpson v. State*, 56 Ark. 8, 19 S. W. 99; *Chrisman v. State*, 54 Ark. 283, 15 S. W. 889, 26 Am. St. 44; *Crosby v. People*, 137 Ill. 325, 27 N. E. 49; *State v. Taylor*, 70 Vt. 1, 39 Atl. 447, 42 L. R. A. 673; *State v. Dolan*, 17 Wash. 499, 50 Pac. 472; see also, *People v. Mize*, 80 Cal. 41, 22 Pac. 80; *Gallery v. State*, 92 Ga. 463, 17 S. E. 863; but compare, *People v. Odell*, 1 Dak. 197, 46 N. W. 601; *State v. Musick*, 101 Mo. 260, 14 S. W. 212.

³² *State v. Brown*, 12 Minn. 538;

Green v. State, 28 Miss. 687; *Davis v. State*, 51 Neb. 301, 70 N. W. 984; *State v. Knight*, 43 Me. 11; *Brown v. State*, 62 N. J. L. 666, 42 Atl. 811; *State v. Lambert*, 93 N. Car. 618; *Lewis v. State*, 90 Ga. 95, 15 S. E. 697; *Boyd v. State*, 28 Tex. App. 137, 12 S. W. 737.

³³ *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; *State v. Hockett*, 70 Iowa 442, 30 N. W. 742, 4 L. R. A. 298; *Hadley v. State*, 55 Ala. 31; *Harkness v. State*, 129 Ala. 71, 30 So. 73; *State v. Davis*, 9 Houst. (Del.) 407, 33 Atl. 55; *Jackson v. State*, 53 Ga. 195; *Hanye v. State*, 99 Ga. 212, 25 S. E. 307.

³⁴ See, *State v. Curtis*, 70 Mo. 594; *State v. Evans*, 124 Mo. 397, 28 S. W. 8; *McDermott v. State*, 89 Ind. 187; *Friederich v. People*, 147 Ill. 610, 35 N. E. 472; *Murphy v. State*, 31 Ind. 511; *Holland v. State*, 12 Fla. 117.

³⁵ *Dejarnette v. Commonwealth*, 75 Va. 867.

likewise said that malice is implied by law from any deliberate and cruel act committed by one person against another.³⁶ That is, malice is presumed in all cases of deliberate homicide not done in the heat of passion.³⁷ And a presumption of malice arises upon proof that a killing was wilful, premeditated and deliberate.³⁸ So where no express malice is shown, yet, if the killing was done under circumstances of cruelty and malignity, it is said that the law presumes malice.³⁹ Again, it is said that malice is presumed from a deliberate injury to another, or from the use of a deadly weapon, resulting in another's death.⁴⁰ And where there is a lack of provocation malice may be presumed. Thus where two persons are fighting, and a third, unconnected with either, without any apparent provocation, stabs one of the parties, it is held that the law will imply malice.⁴¹ And malice is ordinarily inferred from a premeditated killing without sufficient provocation or excuse.⁴² Thus a presumption of malice arises; that is, the law, it is said, will imply malice from the fact of the absence of apparent, well-founded danger of great bodily harm, or such provocation as is calculated to excite irresistible passion.⁴³

§ 3017. Presumption as to malice—In general.—A presumption as to malice and premeditation may arise from the circumstances of the case.⁴⁴ So it is held that a presumption of malice may arise upon proof of the mere fact of killing.⁴⁵ And it is held that every unexplained homicide is presumptively malicious until the contrary appears.⁴⁶ Thus it has been said that where the fact of killing a human

³⁶ *Kilpatrick v. Commonwealth*, 3 Phila. (Pa.) 237.

³⁷ *People v. Kirby*, 2 Park. Cr. Cas. (N. Y.) 28.

³⁸ *State v. Curtis*, 70 Mo. 594.

³⁹ *McDaniel v. State*, 16 Miss. 401, 47 Am. Dec. 93; *State v. Coleman*, 20 S. Car. 441; see also, *Kota v. People*, 136 Ill. 655, 27 N. E. 53; *People v. McDonald*, 2 Idaho 14, 1 Pac. 345.

⁴⁰ *Davison v. People*, 90 Ill. 221.

⁴¹ *Conner v. State*, 12 Tenn. 137, 26 Am. Dec. 217.

⁴² *State v. Brooks*, 1 Ohio Dec. (Reprint) 407, 9 Wkly. L. J. 109.

⁴³ *Perl v. People*, 65 Ill. 17.

⁴⁴ *Hicks v. State*, 25 Fla. 535, 6 So. 441; malice may, of course, be in-

ferred from circumstances; *Coolman v. State*, (Ind.) 72 N. E. 568; see also, *Crosby v. People*, 137 Ill. 325, 27 N. E. 49; *State v. Woodard*, 84 Iowa 172, 50 N. W. 885; *Lane v. State*, 85 Ala. 11, 4 So. 730.

⁴⁵ *Epperson v. State*, 73 Tenn. 291; *State v. Douglass*, 28 W. Va. 297; from intentional killing, in absence of anything to show want of malice; *State v. McDaniel*, 68 S. Car. 304, 47 S. E. 384, 102 Am. St. 661; see also, first and third notes to last preceding section.

⁴⁶ *McDaniel v. State*, 16 Miss. 401, 47 Am. Dec. 93; *State v. Brown*, 12 Minn. 538; *Clements v. State*, 50 Ala. 117; *State v. Testerman*, 68 Mo.

being has been clearly established, and has not been shown to be the result of accident, or to have been done under such circumstances as will in law mitigate, excuse or justify the act, the law implies malice without further proof, and makes the killing murder.⁴⁷ It has also been held that a presumption of malice arises where the act is committed while the accused is engaged in the perpetration of some other felonious or unlawful act.⁴⁸ And a presumption of malice may arise upon proof of the intentional use of a deadly weapon.⁴⁹ And where the reckless use of a dangerous weapon resulted in injury, it was held that malice would be implied.⁵⁰ Thus, it has been held that a presumption arises that a shot was fired maliciously, where the defendant recklessly fired his pistol into a crowded room and killed decedent.⁵¹ And it has been held that malice arises from the use of a knife causing death, though it was only a pocket-knife.⁵² So, generally, a presumption of malice may well arise where an act is unlawful, and is of such a character as that the known consequences of it would naturally be to produce great bodily harm or to endanger the life of the person.⁵³ And so when it is shown that the act was done with a deadly weapon, and no circumstances of mitigation, justification or excuse appear, it is said that the law implies malice.⁵⁴ Malice may be reasonably presumed from the wilful administration of poison in a quantity sufficient to cause death under ordinary circumstances.⁵⁵ And it has been held that where the existence of deliberate malice in the slayer is once ascertained, its continuance down to the perpetration of the meditated act must be presumed until there is evidence to repel it, and to show that the wicked purpose has been abandoned.⁵⁶

408; *Preult v. People*, 5 Neb. 377; *Davis v. State*, 25 Ohio St. 369; *Lewis v. State*, 90 Ga. 95, 15 S. E. 697.

⁴⁷ *Brown v. State*, 4 Tex. App. 275.

⁴⁸ *State v. Thomas*, *Houst. Cr. Cas.* (Del.) 511; see notes in 63 L. R. A. 355 and 660.

⁴⁹ *State v. Curtis*, 70 Mo. 594; *Warwick, Ex parte*, 73 Ala. 57; *State v. Bertrand*, 3 Ore. 61; *Head v. State*, 44 Miss. 731; *State v. Ward*, 5 Har. (Del.) 496.

⁵⁰ *Dunaway v. People*, 110 Ill. 333, 51 Am. R. 686.

⁵¹ *Brown v. Commonwealth*, 13 Ky. L. R. 372, 17 S. W. 220.

⁵² *Webb v. State*, 100 Ala. 47, 14 So. 865.

⁵³ *Boyle v. State*, 105 Ind. 469, 5 N. E. 203, 55 Am. R. 218.

⁵⁴ *McAdams v. State*, 25 Ark. 405; *State v. Walker*, 9 *Houst.* (Del.) 464, 33 Atl. 227; *State v. Decklots*, 19 Iowa 447.

⁵⁵ *People v. Sanchez*, 24 Cal. 17.

⁵⁶ *State v. Tilly*, 3 Ired. (N. Car.) 424; *Potsdamer v. State*, 17 Fla. 895; *Holland v. State*, 12 Fla. 117; but compare, *State v. Brown*, 64 Mo.

§ 3018. Presumptions—When not presumed—Conflicting views.

The general rule is that even though malice may be presumed from the mere fact of killing when the killing is proved, and no more, yet when all the facts and circumstances of the killing are in evidence, and the jury must say from the testimony what was the intention with which the act was committed then malice becomes a matter of proof and is not presumed as a matter of law.⁵⁷ Thus where all the circumstances attending the homicide are in evidence, there is no presumption of malice from the mere fact of the killing,⁵⁸ although it may, of course, be inferred. It is said by Mr. Underhill that: "A rebuttable presumption of law of a malicious intention always arises as soon as a homicide with a deadly weapon is proved. This may become conclusive if no defense is made. But it may be rebutted by evidence coming from the state. If this does not happen the accused may offer evidence to show he did the killing in self-defense or while insane. The presumption of malice thus removed, it is for the jury to find whether malice existed on all the facts and not merely from the use of a deadly weapon alone. If malice is ascertained to have existed before the killing, as, for example, from evidence of threat, its continuance down to the homicide will be presumed, as matter of law, in the absence of evidence to the contrary."⁵⁹ Where the evidence which proves the killing excludes a presumption of malice from the use of a deadly weapon, malice must be established by other evidence.⁶⁰ And it has been held that malice is implied from the fact that a deadly weapon was used in the killing of another, unless it first appears that the killing was wilfully or intentionally done.⁶¹ And it is also held that a presumption of malice does not necessarily arise from an intent to inflict a personal injury, since an act, to be ma-

367; *Copeland v. State*, 7 Humph. (Tenn.) 479; *Cannon v. State*, 57 Miss. 147; *McCoy v. State*, 25 Tex. 33, 78 Am. Dec. 520.

⁵⁷ *State v. Alexander*, 30 S. Car. 74, 8 S. E. 440, 14 Am. St. 879; *People v. West*, 49 Cal. 610; *Elland v. State*, 52 Ala. 322; *Fitch v. State*, 90 Ga. 472, 16 S. E. 102; *Commonwealth v. Hawkins*, 3 Gray (Mass.) 463; *Vollmer v. State*, 24 Neb. 838, 40 N. W. 420; *Bryant v. State*, 7

Baxt. (Tenn.) 67; *State v. Robinson*, 20 W. Va. 713, 43 Am. R. 799.

⁵⁸ *State v. Jones*, 29 S. Car. 201, 7 S. E. 296; *State v. Ariel*, 38 S. Car. 221, 16 S. E. 779; *Godwin v. State*, 73 Miss. 873, 19 So. 712.

⁵⁹ *Underhill Cr. Ev.* § 320; see, *Riggs v. State*, 30 Miss. 635.

⁶⁰ *Compton v. State*, 110 Ala. 24, 20 So. 119.

⁶¹ *State v. Cross*, 42 W. Va. 253, 24 S. E. 996; see also, *Godwin v. State*, 73 Miss. 873, 19 So. 712.

§ 3020. **Other presumptions.**—As intimated in the last preceding section, it is the rule in most jurisdictions that where the homicide has been proved without more, there is no presumption that it was done with premeditation, and the presumption usually is that it is murder in the second degree.⁷⁶ So the use of a deadly weapon only raises a presumption of malice, and not of premeditation and design.⁷⁷ But deliberation, premeditation and malice may be inferred from the circumstances connected with the killing.⁷⁸ It has been held that a presumption does not arise that a gun was loaded with a bullet or other substance likely to produce death simply from a threat to shoot being immediately followed by the discharge of a gun.⁷⁹ But other cases hold that a gun or pistol discharged or attempted to be discharged at another under such circumstances will be presumed to have been loaded with a deadly charge,⁸⁰ or at least that such an inference may be drawn. It has been held that where the decedent made a certain threat to kill a certain person in case a certain thing was consummated a presumption does not necessarily arise that in going to that place he went to carry his threat into execution.⁸¹ Until the prosecution establishes that the death was the result of a criminal act, death is generally presumed to have resulted from natural causes.⁸² And it has been held that on a trial for the

⁷⁶ *State v. Adin*, 7 Ohio Dec. (Reprint) 25, 1 Wkly. L. B. 38; and authorities cited in note 67 of this chap.; see also, *Fields v. State*, 52 Ala. 348; *Brown v. State*, 109 Ala. 70, 20 So. 103; *State v. Lane*, 64 Mo. 319; *State v. Bowles*, 146 Mo. 6, 47 S. W. 892, 69 Am. St. 598; *O'Mara v. Commonwealth*, 75 Pa. St. 424.

⁷⁷ *North Carolina v. Gosnell*, 74 Fed. 734; see also, *Fallin v. State*, 83 Ala. 5; 3 So. 525; *State v. Stoeckli*, 71 Mo. 559, 8 Mo. App. 598; *State v. Herrell*, 97 Mo. 105, 10 S. W. 387, 10 Am. St. 289; *State v. Hicks*, 125 N. Car. 636, 34 S. E. 274; *Dains v. State*, 2 Humph. (Tenn.) 438; but compare, *State v. Brown*, 41 Minn. 319, 43 N. W. 69; *Cupps v. State*, 120 Wis. 504, 97 N. W. 210, 98 N. W. 546, 102 Am. St. 996.

⁷⁸ *Green v. State*, 13 Mo. 382; *State*

v. Walker, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133; *Adams v. State*, 28 Fla. 511; *People v. Kennedy*, 159 N. Y. 346, 54 N. E. 51, 70 Am. St. 557; *State v. Booker*, 123 N. Car. 713, 31 S. E. 376; *People v. Neary*, 104 Cal. 373, 37 Pac. 943; *Commonwealth v. Birriolo*, 197 Pa. St. 371, 47 Atl. 355; *Waggoner v. State*, (Tex. Cr. App.) 55 S. W. 491; *State v. Anderson*, 10 Ore. 448.

⁷⁹ *Fastbinder v. State*, 42 Ohio St. 341.

⁸⁰ *State v. Munco*, 12 La. Ann. 625; see also, *Mullen v. State*, 45 Ala. 43, 6 Am. R. 691; *Porter v. State*, 57 Miss. 300; *Bedford v. State*, 44 Tex. Cr. App. 97, 69 S. W. 158.

⁸¹ *State v. Brown*, 64 Mo. 367.

⁸² *State v. Moxley*, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556.

murder of an officer while attempting to arrest defendant for unlawfully carrying a weapon, the law will presume that the citizens who informed deceased that defendant had been so carrying a weapon were credible witnesses.⁸³

§ 3021. Burden of proof—As to malice.—Proof of malice, express or implied, is necessary to a conviction for murder.⁸⁴ And the burden of proving malice is on the prosecution when all the attending circumstances appear in evidence.⁸⁵ And it has been held that the burden of proof is on the prosecution to show that defendants brought on the difficulty with deceased in which the killing occurred.⁸⁶ But in many jurisdictions where there has been a killing with a deadly weapon, or the presumption of malice otherwise arises, the burden of proving excuse or mitigation is held to be on the defendant.⁸⁷

§ 3022. Burden of proof—As to defenses of self-defense and insanity.—In some jurisdictions the burden of proof as to self-defense and to insanity is said to be on the defendant.⁸⁸ There is a large number of cases to the effect that the burden of proving self-defense is on the defendant.⁸⁹ Thus, it is held that when the state has established the charge beyond a reasonable doubt, and defendant pleads self-defense, the burden is on him to show it by a preponderance of testimony;⁹⁰ and that on a trial for the malicious shooting of a per-

⁸³ *Miller v. State*, 32 Tex. Cr. App. 319, 20 S. W. 1103.

⁸⁴ *State v. Walker*, 9 Houst. (Del.) 464, 33 Atl. 227.

⁸⁵ *Commonwealth v. Hawkins*, 3 Gray (Mass.) 463; *Godwin v. State*, 73 Miss. 873, 19 So. 712; *People v. West*, 49 Cal. 610; *Vollmer v. State*, 24 Neb. 838, 40 N. W. 420; *State v. Alexander*, 30 S. Car. 74, 8 S. E. 440, 14 Am. St. 879.

⁸⁶ *Gibson v. State*, 89 Ala. 121, 8 So. 98, 18 Am. St. 96.

⁸⁷ *State v. Whitson*, 111 N. Car. 695, 16 S. E. 332; and authorities cited in next two sections. But, as already stated, when the circumstances are shown this presumption, if any, may be overcome, and we think the burden remains upon the

prosecution of ultimately convincing the jury of the defendant's guilt beyond a reasonable doubt.

⁸⁸ *Weaver v. State*, 24 Ohio St. 584; *State v. Baber*, 11 Mo. App. 586; *United States v. Crow Dog*, 3 Dak. 106, 14 N. W. 437; *State v. Ballou*, 20 R. I. 607, 40 Atl. 861; *State v. Manns*, 48 W. Va. 480, 37 S. E. 613; *State v. Johnson*, 49 W. Va. 684, 39 S. E. 665; *People v. Tidwell*, 5 Utah 88, 12 Pac. 638; *People v. Schryver*, 42 N. Y. 1; *State v. Bertrand*, 3 Ore. 61.

⁸⁹ *Silvus v. State*, 22 Ohio St. 90; *Roden v. State*, 97 Ala. 54, 12 So. 419, and authorities cited in last note, *supra*.

⁹⁰ *State v. Welsh*, 29 S. Car. 4, 6 S. E. 894.

son with intent to kill, the burden of proving that the act was done in self-defense rests on the defendant.⁹¹ So, in a very recent case where it appears that defendant killed the deceased by the intentional use of a deadly weapon, it was held that the burden was on defendant to show that such use of the weapon was in self-defense or otherwise excusable, or occurred on sudden heat caused by adequate provocation.⁹² But where the defendant has made out a case of self-defense, the burden of proving that he was at fault in bringing about the difficulty has been held to be upon the state.⁹³ In some jurisdictions it is held that the burden is on the state to prove beyond a reasonable doubt that a killing was not excusable by reason of self-defense.⁹⁴ And in some others, although the burden is said to be upon the defendant, it is sufficient for him to remove it by creating a reasonable doubt.⁹⁵ Indeed, even where the burden is held to be upon the defendant to show self-defense beyond a reasonable doubt, it seems that this relates to the facts tending to establish that defense, and that if there is still a reasonable doubt upon the evidence, he should be acquitted.⁹⁶ As to the defense of insanity it is held that the absence of any known cause or apparent motive to commit a homicide cannot of itself raise a presumption of insanity.⁹⁷ There is much conflict among the authorities as to the burden of proof upon the question of insanity, a few courts holding that it must be proved beyond a reasonable doubt, others holding that it must be proved by a preponderance of the evidence, or to the satisfaction of the jury, and still others holding that there should be an acquittal if there is a reasonable doubt upon all the evidence. This question, however, is fully discussed elsewhere.⁹⁸ Although the distinction is seldom noted in the decisions, we think that when the burden is said to be upon the de-

⁹¹ *Weaver v. State*, 24 Ohio St. 584. S. E. 13; *State v. Prater*, 52 W. Va.

⁹² *Coolman v. State*, (Ind.) 72 N. E. 568. 132, 43 S. E. 230.

⁹³ *Holmes v. State*, 100 Ala. 80, 14 So. 864. ⁹⁴ *Brown v. State*, 62 N. J. L. 666, 42 Atl. 811; *State v. Jones*, 78 Mo. 278; *King v. State*, 74 Miss. 576, 21

⁹⁵ *State v. Donahoe*, 78 Iowa 486, 43 N. W. 297. So. 235; *State v. Pierce*, 8 Nev. 291; *State v. McGarry*, 111 Iowa 709, 83

⁹⁶ *Henson v. State*, 112 Ala. 41, 20 So. 79; *People v. Bushton*, 80 Cal. 160, 22 Pac. 549; *People v. Neary*, 104 Cal. 373, 37 Pac. 943; *McKenna v. State*, 61 Miss. 589; *People v. Downs*, 123 N. Y. 558, 25 N. E. 988; *People v. Callaghan*, 4 Utah 49, 6 Pac. 49.

⁹⁷ *Carter v. State*, 12 Tex. 500, 62 Am. Dec. 539.

⁹⁸ See Vol. IV, Chap. 127, and Vol. I, § 126.

fendant to prove justification, mitigation or excuse, or the like, the burden of going forward or producing evidence is usually meant, and that the burden of ultimately convincing the jury of the defendant's guilt on the whole evidence beyond a reasonable doubt rests and remains upon the prosecution.

§ 3023. Burden of proof—In general.—The burden of proof is on the state to establish the death of a human being and the criminal agency producing it. Indeed, the burden of proof is upon the prosecution to establish all the essential elements of the crime and prove the defendant's guilt beyond a reasonable doubt.⁹⁹ The usual order is to first prove the corpus delicti, which is done by proving the death and identifying the dead body as that of the person alleged to have been killed, and showing the criminal agency causing such death. The accused may then be identified and the crime brought home to him, and the other essential elements of the crime shown. There can be no conviction in the absence of satisfactory proof of the corpus delicti, but the order of proof is largely within the discretion of the trial court, and, as shown in the first chapter of this volume, even the corpus delicti may be proved, in a proper case, by circumstantial evidence. So, while we think it is true that the burden is upon the prosecution to establish the defendant's guilt beyond a reasonable doubt, the presumptions already considered often exert an important influence when facts are proved from which they arise, and in some jurisdictions the burden is said, in a sense at least, to shift to the defendant as to certain matters thereafter. It has been held that the burden of proof is on the state to prove beyond a reasonable doubt that the death of the deceased occurred before the indictment was returned.¹⁰⁰ So, it is held that the burden of proof is on the prosecution to satisfy the jury of the guilt of the accused where the defense is based on facts and circumstances growing out of the charge itself;¹⁰¹ and that the burden of proof is on the prosecution to clearly show that the weapon was of the character charged in order to sustain an indictment charging the commission of an assault with intent to commit murder by the use of a weapon likely to produce death.¹⁰²

⁹⁹ *Wharton v. State*, 73 Ala. 366; *son v. People*, 4 Park. Cr. Cas. (N. Y.) 619.

Maher v. People, 10 Mich. 212, 81 Am. Dec. 781; *Commonwealth v. Hawkins*, 3 Gray (Mass.) 463; *Kent v. People*, 8 Colo. 563, 9 Pac. 852; *Jones v. State*, 13 Tex. App. 1; *Wil-*

¹⁰⁰ *Power v. People*, 17 Colo. 178, 28 Pac. 1121.

¹⁰¹ *Hill v. People*, 1 Colo. 436.

¹⁰² *Paschal v. State*, 68 Ga. 818.

But it has also been held that the burden is not on the prosecution to show absence of justification or legal excuse;¹⁰³ nor to prove that the deceased was without arms.¹⁰⁴ The burden has been held to be on the defendant to rebut the presumption of malice arising from the use of a deadly weapon.¹⁰⁵ It has also been held that the burden of proving matters of mitigation rests upon the defendant.¹⁰⁶ Thus, it is held that the burden of proving facts which authorize the taking of life to preserve life is upon the defendant;¹⁰⁷ and that when a defendant relies upon mitigating circumstances to reduce a homicide from murder to manslaughter, the burden rests upon him, after the killing is shown, to prove the mitigating facts.¹⁰⁸ So, if a man presents a gun at another within shooting distance, it has been said to be a legal presumption that the gun was loaded; and it devolves on the accused to prove that it was not loaded, and that he knew it was not.¹⁰⁹ The burden of proof has also been held to be on the accused to show that a person alleged to have been murdered is still alive when the death of such person is *prima facie* established by the identification of a dead body as his;¹¹⁰ and that the burden of proof is also on the accused to show by a preponderance of the testimony that the killing was justifiable when the fact of the homicide is once established.¹¹¹ So, it has been held proper to instruct that the burden is on the defendant to establish his claim that he was so intoxicated at the time of the killing as to be incapable of forming any intent.¹¹² In line with the cases already cited, if not indeed beyond that line, it is said in a recent text-book: "As a general rule it may be stated that all homicide is malicious, and, of course, amounts to murder, unless when justified, excused or alleviated. All these circumstances of justification, excuse or alleviation must be shown by the prisoner."¹¹³

¹⁰³ *State v. Brown*, 64 Mo. 367.

¹⁰⁴ *State v. Wright*, 41 La. Ann. 605, 6 So. 137.

¹⁰⁵ *State v. Peo.* 9 Houst. (Del.) 488, 33 Atl. 257; *People v. March*, 6 Cal. 543.

¹⁰⁶ *State v. Mazon*, 90 N. Car. 676.

¹⁰⁷ *Lewis v. State*, 88 Ala. 11, 6 So. 755.

¹⁰⁸ *State v. Jones*, 98 N. Car. 651, 3 S. E. 507.

¹⁰⁹ *Caldwell v. State*, 5 Tex. 18.

¹¹⁰ *State v. Vincent*, 24 Iowa 570, 95 Am. Dec. 753.

¹¹¹ *People v. Raten*, 63 Cal. 421.

¹¹² *State v. Corrivau*, (Minn.) 100 N. W. 638.

¹¹³ *Hughes Cr. Law & Proc.*, § 82; *O'Mara v. Commonwealth*, 75 Pa. St. 424, 430; *State v. Tommy*, 19 Wash. 270, 53 Pac. 157; *State v. Mason*, 54 S. Car. 240, 32 S. E. 357; *State v. Byrd*, 121 N. Car. 684, 28 S. E. 353; 1 McClain Cr. Law, § 333; 4 Blackstone Comm. 201; *Davis v. State*, 51 Neb. 301, 70 N. W. 984; *Linehan v. State*, 113 Ala. 70, 21 So. 497; *People v. Marshall*, 112 Cal. 422, 44 Pac.

But it is held in several cases that the burden is not on the defendant to prove that the homicide was accidental, and in a recent case it is said: "The rule has been established in this state that where self-defense is pleaded to an indictment, the defendant must establish it by the preponderance of the evidence, but at the same time the guilt of the accused must be made to appear beyond a reasonable doubt."¹¹⁴ Whether such a rule as applied to self-defense is sound or practically useful, we need not now inquire. But we do not think that a defense that the homicide was accidental is in any sense an affirmative defense. It is distinguishable from self-defense as a plea, which admits an intentional killing, and sets up as justification a necessity to kill in order to save the accused from death or serious bodily harm; whereas a defense of homicide by accident denies that the killing was intentional."¹¹⁵

§ 3024. Questions of law or fact.—It is frequently important to know whether the court or jury should determine what is a deadly

718; *Territory v. Lucero*, 8 N. Mex. 543, 46 Pac. 18; 3 *Greenleaf Ev.*, § 144; we have already expressed the opinion that the burden of ultimately establishing the defendant's guilt remains upon the prosecution throughout, and when it is said that the burden shifts or is upon the defendant, we think that this can only mean in the sense of going forward or producing evidence. For a statement of a distinction between extrinsic defenses requiring to be affirmatively proved and those relating to the *res gestae*, see, *Kent v. People*, 8 Colo. 563, 9 Pac. 852; also see, *Jones v. State*, 13 Tex. App. 1.

¹¹⁴ Citing, *State v. Welsh*, 29 S. Car. 4, 6 S. E. 894; *State v. Bodie*, 33 S. Car. 117, 11 S. E. 624.

¹¹⁵ *State v. McDaniel*, 68 S. Car. 304, 47 S. E. 384, 102 Am. St. 661, 672. The court also said: "In, *Commonwealth v. McKie*, 1 Gray (Mass.) 61, 61 Am. Dec. 410, the logical rule is thus stated: 'Where the defendant sets up no separate independent fact

in answer to a criminal charge, but confines his defense to the original transaction charged as criminal, with its accompanying circumstances, the burden of proof does not change, but remains on the government to satisfy the jury that the act was unjustifiable and unlawful.' In the case of, *State v. Cross*, 42 W. Va. 253, 24 S. E. 996, the court held that the defense of accidental killing is a denial of the criminal intent, and throws upon the state the burden of proving such intent beyond a reasonable doubt, and the accused is not required to sustain such defense by a preponderance of testimony. It was error, therefore, to instruct the jury to disregard the plea of accidental homicide, if the defendant failed to establish it by the preponderance of the evidence." But see, *State v. Bonds*, 2 Nev. 265; *Rex v. Morrison*, 8 Car. & P. 22, 34 E. C. L. 587; *United States v. Schneider*, 21 D. C. 381.

weapon, and there is some conflict upon the question. It has been held that whether a pocket-knife is a deadly weapon, so as to authorize the inference of malice from the use thereof, is a question for the jury;¹¹⁶ and that a piece of wood three feet long, three inches wide, and one inch thick cannot be said, as matter of law, not to be a deadly weapon; but the question whether it is or not should be left to the jury to determine.¹¹⁷ So, whether a knife or a brick-bat is a deadly weapon has been held to be a question of fact for the jury.¹¹⁸ But some jurisdictions hold that as a general rule, at least where the weapon appears capable of inflicting death or great bodily injury, the question whether a particular weapon is deadly or not is one of law for the court, and not of fact for the jury.¹¹⁹ Many articles, not ordinarily used as deadly weapons may, however, be used as such,¹²⁰ and in doubtful cases the question is usually for the jury, under all the circumstances.¹²¹ And the question as to what was the instrument used to occasion death is a question of fact.¹²² Whether a killing was premeditated is a question of fact for the jury.¹²³ Hence, it is held that the questions of deliberation and premeditation are peculiarly within the province of the jury;¹²⁴ and that whenever death is caused by the use of a deadly weapon, it is for the jury to say, under the evidence, whether or not there existed "a wilful, deliberate and premeditated intention" to kill.¹²⁵ It is also for the jury to determine whether there was any motive for the crime,¹²⁶ and whether the killing was in a passion roused by an adequate provocation has been held to be a question for the jury.¹²⁷ The reasonableness of defendant's apprehension that deceased was about to commit a felony is also a

¹¹⁶ *Sylvester v. State*, 71 Ala. 17; *Nicholls v. State*, 24 Tex. App. 137, but see, *Connell v. State*, (Tex. Cr. App.) 81 S. W. 746; *Webb v. State*, 289, 25 N. W. 248; *State v. Smith*, 100 Ala. 47, 14 So. 865; *State v. Roan*, 122 Iowa 136, 97 N. W. 997. *State v. Brown*, 67 Iowa 289, 25 N. W. 248.

¹¹⁷ *State v. Brown*, 67 Iowa 289, 25 N. W. 248.

¹¹⁸ *State v. Harper*, 69 Mo. 425.

¹¹⁹ *State v. Rigg*, 10 Nev. 284; *State v. Craton*, 6 Ired. L. (N. Car.) 164; *Krchnavy v. State*, 43 Neb. 337, 61 N. W. 628; see also, *Hamilton v. People*, 113 Ill. 34.

¹²⁰ *Birdwell v. State*, (Tex. Cr. App.) 48 S. W. 583.

¹²¹ *Tesney v. State*, 77 Ala. 33;

State v. Brown, 67 Iowa 289, 25 N. W. 248; *State v. Smith*, 164 Mo. 567, 65 S. W. 270; *Danforth v. State*, 44 Tex. Cr. App. 105, 69 S. W. 159.

¹²² *State v. Speaks*, 94 N. Car. 865.

¹²³ *Lovett v. State*, 30 Fla. 142, 11 So. 550, 17 L. R. A. 705.

¹²⁴ *People v. Valencia*, 43 Cal. 552.

¹²⁵ *Abernethy v. Commonwealth*, 101 Pa. St. 322.

¹²⁶ *People v. Johnson*, 139 N. Y. 358, 34 N. E. 920.

¹²⁷ *Mackey v. State*, 13 Tex. App. 360.

question for the jury.¹²⁸ Thus, it is a question of fact for the jury to determine whether the prisoner, at the time he slew the deceased, had reasonable ground to believe his own life to be in danger from the deceased.¹²⁹ So where a plea of self-defense is set up, it is a question of fact for the jury as to whether or not defendant could have safely retreated.¹³⁰ And the question whether an injury was accidentally self-inflicted is also for the jury.¹³¹ Whether a shot would or would not have produced death, under certain circumstances is a question for the jury.¹³² Whether the name of the deceased mentioned in an indictment for murder was his true name is a question for the jury.¹³³ And when the charge is the killing with a knife, and all the evidence taken together tends to identify the knife used in evidence as the one used by the defendant, the question of the identity of the knife is exclusively for the jury.¹³⁴ It is for the jury to determine the degree of the crime.¹³⁵ That is, it is the province of the jury, under proper instructions from the court, to determine the degree of defendant's guilt.¹³⁶ And it has been held that the court has no authority on trial for homicide to require the jury to render a verdict for any particular degree of the crime.¹³⁷ For it is for the jury to find from all the evidence whether a killing is murder; and, if so, whether in the first or second degree.¹³⁸ And so the question whether a manslaughter committed by the accused was voluntary or involuntary, is one of fact for the jury.¹³⁹ The conclusiveness of circumstantial evidence to establish the fact of the death of the person al-

¹²⁸ *State v. Harris*, 46 N. Car. 190.

¹²⁹ *Pfomer v. People*, 4 Park. Cr. Cas. (N. Y.) 558.

¹³⁰ *De Arman v. State*, 77 Ala. 10.

¹³¹ *State v. Bradley*, 34 S. Car. 136, 13 S. E. 315.

¹³² *People v. McFadden*, 65 Cal. 445, 4 Pac. 421.

¹³³ *State v. Angel*, 7 Ired. L. (N. Car.) 27.

¹³⁴ *State v. Chee Gong*, 17 Ore. 635, 21 Pac. 882.

¹³⁵ *State v. Moran*, 7 Clarke (Iowa) 236; *Gafford v. State*, 125 Ala. 1, 20 So. 406; *Washington v. State*, 125 Ala. 40, 28 So. 78; *Carpenter v. State*, 58 Ark. 233; 24 S. W. 247; *Marshall v. State*, 32 Fla. 462; 14

So. 92; *State v. Cleveland*, 58 Me. 564; *Parrish v. State*, 18 Neb. 405, 25 N. W. 573; *State v. Gray*, 19 Nev. 212; 8 Pac. 456; *People v. Conroy*, 97 N. Y. 62; *State v. Lucas*, 124 N. Car. 825, 32 S. E. 962; *State v. Grant*, 7 Ore. 414; *Commonwealth v. Sheets*, 197 Pa. St. 69, 46 Atl. 753; *State v. Boyce*, 24 Wash. 514, 64 Pac. 719; *State v. Welch*, 36 W. Va. 690, 15 S. E. 419.

¹³⁶ *People v. Martinez*, 66 Cal. 278, 5 Pac. 261.

¹³⁷ *Adams v. State*, 29 Ohio St. 412; see also, *State v. Gadberry*, 117 N. Car. 811, 23 S. E. 477.

¹³⁸ *State v. Carr*, 53 Vt. 37.

¹³⁹ *Bruner v. State*, 58 Ind. 159.

leged to have been murdered is solely for the jury.¹⁴⁰ And whether an officer is guilty of criminal negligence in shooting one whom he is attempting to arrest, and who he has reason to believe has committed a felony, has been held to be a question for the jury.¹⁴¹ So, what constitutes negligence on the part of an engineer of a steamboat in case of an explosion resulting in loss of life has been held to be a question for the jury.¹⁴² It is also held that an expert may not testify that the deceased would, after receiving a fatal blow, have sufficient strength to inflict a blow with the effect specified as this is a question for the jury;¹⁴³ and that when death does not result from the unlawful use of a deadly weapon, intention to kill is not a matter of legal presumption, but is a question for the jury.¹⁴⁴ So, it has been held that the question how much less weight a threat made by an excited man is entitled to than one made by a cool man is not a subject for a charge by the court, but a question for the jury.¹⁴⁵ But it has been said that murder is a conclusion of law drawn from certain facts,¹⁴⁶ and that what facts would be sufficient to justify or excuse a killing is a question of law.¹⁴⁷ So, it has been held that whether certain facts would amount to a sufficient provocation to reduce the crime of killing from murder to manslaughter is also a question of law.¹⁴⁸ That is, what, as a matter of law, is a sufficient provocation to make what would otherwise be murder a less offense, is a question of law,¹⁴⁹ for, as above stated, the sufficiency of provocation to excuse or extenuate murder is a question of law.¹⁵⁰ But it is for the jury to determine whether the necessary facts exist in the particular case, and in most instances, where the law prescribes no standard, or they are judges of the law as well as the facts, the whole question is for the jury.

§ 3025. Evidence as to the physical condition and the body.—The physical condition of the deceased prior to, or at the instant of his

¹⁴⁰ *Johnson v. Commonwealth*, 81 Ky. 325.

¹⁴¹ *People v. Kilvington*, 104 Cal. 86, 37 Pac. 799, 43 Am. St. 73.

¹⁴² *United States v. Taylor*, 5 McLean (U. S.) 242.

¹⁴³ *People v. Rector*, 19 Wend. (N. Y.) 569; citing, *Selfridge's Trial*, 23 Ed., 1806, pp. 60, 61.

¹⁴⁴ *Gallery v. State*, 92 Ga. 463, 17 S. E. 863.

¹⁴⁵ *McPherson v. State*, 22 Ga. 478.

¹⁴⁶ *People v. Aro*, 6 Cal. 207, 65 Am. Dec. 503.

¹⁴⁷ *Gladden v. State*, 12 Fla. 562.

¹⁴⁸ *State v. Craton*, 6 Ired. L. (N. Car.) 164.

¹⁴⁹ *State v. Dunn*, 18 Mo. 419.

¹⁵⁰ *State v. Jones*, 20 Mo. 58.

death may be shown,¹⁵¹ in a proper case. And evidence of the condition of the body of the deceased when found, and as to the number and character of his wounds, is admissible.¹⁵² So, a non-expert witness may testify as to the wounds he saw on the body.¹⁵³ It has been held that the prosecution may prove statements made by the deceased as to his physical peculiarities in a proper case. Thus, a statement by the deceased that he had a peculiar tooth in his mouth has been held admissible.¹⁵⁴ So, as the identification of the body of the deceased may often be accomplished by means of the testimony of a witness familiar with the teeth of the deceased, such evidence is held admissible.¹⁵⁵ And after witnesses have testified as to the teeth, the jury may then determine as an inference from the points of similarity, if any, the identity of the remains with the person whose death is under consideration.¹⁵⁶ It is also held the state may prove the declarations of the deceased as to his physical condition made to a physician or to a non-professional person.¹⁵⁷ And that a physician may give an opinion of a person's sex based upon his examination of a skeleton.¹⁵⁸

§ 3026. Evidence as to motive.—Proof of a motive for the crime is not indispensable where the defendant's guilt is otherwise established.¹⁵⁹ Proper evidence as to motive, however, is usually admissible, since it has an important bearing upon the probability of the guilt of the accused.¹⁶⁰ But in a prosecution for homicide, where self-

¹⁵¹ *State v. Baldwin*, 36 Kans. 1, 12 Cush. (Mass.) 295; *Rehfuss Dental Pac.* 318; *Phillips v. State*, 68 Ala. 469.

¹⁵² *Commonwealth v. Holmes*, 157 Mass. 233, 32 N. E. 6, 34 Am. St. 270; *McConnell v. State*, 22 Tex. App. 354, 3 S. W. 699, 58 Am. R. 647; *Terry v. State*, 118 Ala. 79, 23 So. 776; *Davidson v. State*, 135 Ind. 254, 34 N. E. 972; *People v. Wright*, 89 Mich. 70, 50 N. W. 792; *Billings v. State*, 52 Ark. 303, 12 S. W. 574.

¹⁵³ *Smith v. State*, 43 Tex. 648; *Everett v. State*, 62 Ga. 65; *Batten v. State*, 80 Ind. 394.

¹⁵⁴ *Edmonds v. State*, 34 Ark. 720. ¹⁵⁵ *Udderzook v. Commonwealth*, 76 Pa. St. 340; see, *Rehfuss Dental Jurisprudence*, § 9, 17-32. ¹⁵⁶ *Commonwealth v. Webster*, 5

Cush. (Mass.) 295; *Rehfuss Dental Jurisprudence*, § 9, 17-32.

¹⁵⁷ *State v. Moxley*, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556; *State v. Fournier*, 68 Vt. 262, 35 Atl. 178.

¹⁵⁸ *Wilson v. State*, 41 Tex. 320.

¹⁵⁹ *Cupps v. State*, 120 Wis. 504, 97 N. W. 210, 98 N. W. 546, 102 Am. St. 996, and note; *State v. Adams*, (N. Car.) 50 S. E. 765; *Johnson v. United States*, 157 U. S. 320, 15 Sup. Ct. 614; *People v. Johnson*, 139 N. Y. 358, 34 N. E. 920; *Commonwealth v. Hudson*, 97 Mass. 565; *State v. David*, 131 Mo. 380, 33 S. W. 28; *Hornsbey v. State*, 94 Ala. 55, 10 So. 522; *Powell v. State*, 67 Miss. 119, 6 So. 646.

¹⁶⁰ *Kelsoe v. State*, 47 Ala. 573;

People v. Ah Fung, 17 Cal. 377;

defense was relied on by the defendant, evidence tending to show improper relations between defendant and the divorced wife of the deceased was held inadmissible to show motive.¹⁶¹ And ordinarily, at least, the facts, which it is sought to introduce as to motive, must have been known to the accused at the time of the killing.¹⁶² The prosecution, as a general rule, has the right to offer any evidence tending to prove a motive for the commission of the crime.¹⁶³ And testimony as to the finding in the defendant's trunk of certain personal property belonging to deceased has been held competent as tending to show motive, and form links in the chain of evidence.¹⁶⁴ Evidence tending to show defendant's feeling toward the person killed is admissible to show a motive for the crime.¹⁶⁵ Evidence that the accused had quarreled with decedent's wife shortly before the commission of

State v. West, Houst. Cr. Cas. (Del.) 371, 382; *Stafford v. State*, 55 Ga. 591; *Farris v. People*, 129 Ill. 521, 21 N. E. 821, 16 Am. St. 283; *Jones v. State*, 64 Ind. 473; *State v. Seymour*, 94 Iowa 699, 63 N. W. 661; *Jackson v. Commonwealth*, 100 Ky. 239, 38 S. W. 422, 66 Am. St. 336; *State v. Edwards*, 34 La. Ann. 1012; *McBride v. Commonwealth*, 95 Va. 818, 30 S. E. 454; *State v. Tettaton*, 159 Mo. 354, 60 S. W. 743; *People v. Benham*, 160 N. Y. 402, 55 N. E. 11.

¹⁶¹ *People v. Wright*, 144 Cal. 161, 77 Pac. 877.

¹⁶² *Gillum v. State*, 62 Miss. 547; *Son v. Territory*, 5 Okla. 526, 49 Pac. 923; *People v. Morgan*, 124 Mich. 527, 83 N. W. 275; *Cockerell v. State*, 32 Tex. Cr. App. 585, 25 S. W. 421.

¹⁶³ *State v. Larkin*, 11 Nev. 314; see also, note 161 of this chap.

¹⁶⁴ *Morris v. State*, 30 Tex. App. 95, 16 S. W. 757; in a prosecution for murder, in which it appeared that defendant and deceased had, on the day before the killing, been gambling, in the course of which deceased had obtained defendant's watch, evidence that, on the evening before the killing, deceased wore a cord with the defendant's watch at-

tached thereto, and that, when the body was found, the cord was on it, but the watch was gone, was properly admitted to show motive: *Bowen v. State*, 140 Ala. 65, 37 So. 233.

¹⁶⁵ *People v. Kern*, 61 Cal. 244; *People v. Barthleman*, 120 Cal. 7, 52 Pac. 112; *State v. Reed*, 50 La. Ann. 990, 24 So. 131; so, it has been held that "evidence that during the afternoon preceding the evening of the killing a third person had told one of the defendants of a statement which deceased had made concerning him, and that this defendant had then said that he would kill deceased, was, when restricted in its application to the defendant concerned, properly admitted to show animus."; *Tipton v. State*, 140 Ala. 39, 37 So. 231. But evidence of hostile feelings on the part of defendant toward a class of persons whom he deemed "spotters," was held not to be admissible where the only evidence of the cause of his difficulty with the deceased was that the latter was a "prohibitionist." *Harrison v. State*, (Tex. Cr. App.) 83 S. W. 699.

the murder has been held admissible to show motive.¹⁶⁶ Where one is on trial for the murder of his wife, evidence of his recent acts of personal violence is admissible.¹⁶⁷ So, also, are evidence of ill treatment and previous assaults by the husband on the wife,¹⁶⁸ and for the same purpose evidence that a wife had applied for a divorce has been held admissible to show motive.¹⁶⁹ So, where a murder is committed in an attempt to conceal stolen goods, evidence tending to connect the murder with the previous crime of burglary has been held admissible to show motive.¹⁷⁰ And it has been held that statements of the deceased before the killing, implicating defendant in a larceny, may be admitted to show the motive of the homicide; but his guilt or innocence thereof cannot be entered into.¹⁷¹ And evidence that the accused had stolen money from deceased is admissible as showing motive where the deceased accused defendant of the stealing.¹⁷² So, on a prosecution for murder, evidence of an indictment procured by deceased against the accused for a prior larceny is admissible to show motive.¹⁷³ So, evidence of a desire to be rid of one's husband or wife and infatuation or unlawful relations with another is admissible for the purpose of proving a motive for the homicide.¹⁷⁴ Thus, where the accused is charged with killing his wife, the state may prove an improper intimacy between the accused and a woman other than his wife.¹⁷⁵ And letters from defendant to two other women, showing his relations to them, he being engaged to be married to one, and intimate with the other, who was a prostitute, have been held admissible to show motive for desiring to be rid of his wife.¹⁷⁶ So infatua-

¹⁶⁶ *Gravely v. State*, 45 Neb. 878, 64 N. W. 452.

¹⁶⁷ *Carroll v. State*, 45 Ark. 539; see also, *State v. Seymour*, 94 Iowa 699, 63 N. W. 661; *Painter v. People*, 147 Ill. 444, 35 N. E. 64; *People v. Decker*, 157 N. Y. 186, 51 N. E. 1018; *State v. Bradley*, 67 Vt. 465, 32 Atl. 238.

¹⁶⁸ *State v. O'Neill*, 51 Kans. 651, 33 Pac. 287, 24 L. R. A. 555; see also, *Phillips v. State*, 62 Ark. 119, 34 S. W. 539; *Thiede v. Territory*, 159 U. S. 510, 16 Sup. Ct. 62, and authorities cited in last note supra.

¹⁶⁹ *Pinckord v. State*, 13 Tex. App. 468.

¹⁷⁰ *McConkey v. Commonwealth*, 101 Pa. St. 416.

¹⁷¹ *Williams v. State*, 69 Ga. 11.

¹⁷² *Roberts v. Commonwealth*, 10 Ky. L. R. 433, 8 S. W. 270.

¹⁷³ *Kunde v. State*, 22 Tex. App. 65, 3 S. W. 325; *Gillum v. State*, 62 Miss. 547; *Turner v. State*, 70 Ga. 765; see also, *Smith v. State*, (Fla.) 37 So. 573.

¹⁷⁴ *Hall v. State*, 40 Ala. 698; *Wilkinson v. State*, 31 Tex. Cr. App. 86, 19 S. W. 903.

¹⁷⁵ *Hall v. State*, 40 Ala. 698; *Johnson v. State*, 94 Ala. 35, 10 So. 667.

¹⁷⁶ *O'Brien v. Commonwealth*, 89 Ky. 354, 12 S. W. 471.

tions or unlawful relations with the husband or wife of the deceased is admissible to prove motive. Thus, evidence of the illicit relation between defendant and the wife of the deceased is admissible.¹⁷⁷ But evidence that five days after the murder the wife of the deceased committed adultery with the defendant is inadmissible to show motive.¹⁷⁸ The motive may be shown to have been pecuniary gain. Thus, the state may show, in a proper case, that shortly before his death the deceased was in possession of a large amount of money or other property, and that this fact was known to the accused.¹⁷⁹ So, a statement to a fellow prisoner by one accused of murder that he knew that deceased had a large sum of money in a belt on his person has been held admissible to show motive.¹⁸⁰ Evidence of the receipt of a considerable sum of money by the deceased a few months previous to the murder when the defendant is properly connected with the matter, is competent for the purpose of showing a motive for the commission of the murder.¹⁸¹ And evidence that soon after the murder, the prisoner had much more money in his possession than he had previously has been held competent as tending to show motive.¹⁸² So, it has been held that the state of defendant's bank account, and applications to others for loans, are admissible to show his straitened financial circumstances as a motive for murder.¹⁸³ Evidence may be introduced to show that the motive was for the collection of life insurance on the deceased.¹⁸⁴ For this purpose evidence of the existence of a life insurance policy payable to the accused is competent.¹⁸⁵ And evidence showing that the defendant is the heir at

¹⁷⁷ *Pate v. State*, 94 Ala. 14, 10 So. 665; *Johnson v. State*, 24 Fla. 162, 4 So. 535.

¹⁷⁸ *Traverse v. State*, 61 Wis. 144, 20 N. W. 724.

¹⁷⁹ *State v. Donnelly*, 130 Mo. 642, 32 S. W. 1124; *Ettinger v. Commonwealth*, 98 Pa. St. 338; *Lancaster v. State*, 9 Tex. App. 393; *Davidson v. State*, 135 Ind. 254, 34 N. E. 972; *State v. Crowley*, 33 La. Ann. 782; *State v. Lucey*, 24 Mont. 295, 61 Pac. 994; *Kennedy v. People*, 39 N. Y. 245; see also, *Dean v. State*, (Miss.) 37 So. 501.

¹⁸⁰ *State v. Jackson*, 95 Mo. 623, 8 S. W. 749.

¹⁸¹ *Kennedy v. People*, 39 N. Y. 245.

¹⁸² *State v. Wintzingerode*, 9 Ore. 153.

¹⁸³ *Commonwealth v. Twitchell*, 1 Brewst. (Pa.) 551.

¹⁸⁴ *State v. Rainsbarger*, 74 Iowa 196, 37 N. W. 153; *Commonwealth v. Robinson*, 146 Mass. 571, 16 N. E. 452.

¹⁸⁵ *State v. Rainsbarger*, 71 Iowa 746, 31 N. W. 865; *Commonwealth v. Robinson*, 146 Mass. 571, 16 N. E. 452; *State v. Shackelford*, 148 Mo. 493, 50 S. W. 105; *Commonwealth v. Clemmer*, 190 Pa. St. 202, 42 Atl. 675.

law, legatee, or devisee of the deceased may be competent.¹⁸⁶ The motive may have been to remove an obstacle to improper relations, and so the state may show that the deceased interfered with or prevented the defendant's establishing or maintaining improper relations with some person of the opposite sex.¹⁸⁷ It has also been held competent to bring out any facts tending to show that the defendant was jealous of the deceased.¹⁸⁸ The suppression of evidence may also be shown to be the motive.¹⁸⁹ But it is held that the mere fact that some one else might have had a motive to commit the crime is not competent evidence, since there must be some other facts showing proximity and opportunity in addition to the motive.¹⁹⁰

§ 3027. Means used and cause of death.—Evidence is admissible in a murder case to show the condition of deceased's weapon when found after the homicide.¹⁹¹ And the state may show the condition of the pistol, with which the killing was done, on the morning after the homicide.¹⁹² So, on the other hand, testimony that deceased's pistol had only two loads in it is admissible in rebuttal, as tending to overthrow the theory sought to be established by defendant that deceased first shot at accused.^{192*} Evidence in relation to the examination of guns in the neighborhood, to ascertain whether any of them carried a ball of the size of the one found in the body of the murdered man, has likewise been held admissible.¹⁹³ Testimony as to the character of the wound on the body of deceased is admissible.¹⁹⁴ A physician may testify that an injury discovered upon a

¹⁸⁶ *People v. Buchanan*, 145 N. Y. 1, 39 N. E. 846.

¹⁸⁷ *State v. Reed*, 53 Kans. 767, 37 Pac. 174, 42 Am. St. 322; *State v. Abbatto*, 64 N. J. L. 658; *State v. John*, 8 Ired. L. (N. Car.) 330, 49 Am. Dec. 396; *State v. Chase*, 68 Vt. 405, 35 Atl. 336.

¹⁸⁸ *State v. Reed*, 50 La. Ann. 990, 24 So. 131; *People v. Place*, 157 N. Y. 584, 52 N. E. 576; *State v. Larkin*, 11 Nev. 314.

¹⁸⁹ *State v. Patza*, 3 La. Ann. 512; *State v. Welch*, 22 Mont. 92, 55 Pac. 927; *State v. Ingram*, 23 Ore. 434, 31 Pac. 1049; *Hudson v. State*, 28 Tex. App. 323, 13 S. W. 388; *Turner v. State*, 70 Ga. 765; *Dunn v. State*,

2 Ark. 229, 35 Am. Dec. 54; *Hodge v. State*, 97 Ala. 37, 12 So. 164, 38 Am. St. 145.

¹⁹⁰ *State v. Perry*, 51 La. Ann. 1074, 25 So. 944; *Ogden v. State*, (Tex. Cr. App.) 58 S. W. 1018.

¹⁹¹ *State v. Chevallier*, 36 La. Ann. 81.

¹⁹² *State v. Pritchett*, 106 N. Car. 667, 11 S. E. 357.

^{192*} *State v. Cooper*, 83 Mo. 698.

¹⁹³ *Dean v. Commonwealth*, 32 Gratt. (Va.) 912.

¹⁹⁴ *People v. Wright*, 89 Mich. 70, 50 N. W. 792; *O'Mara v. Commonwealth*, 75 Pa. St. 424; *Batten v. State*, 80 Ind. 394; *Everett v. State*, 62 Ga. 65; *Smith v. State*, 43 Tex.

dead body was inflicted before death.¹⁹⁵ And a physician may testify as to the cause of the death in his opinion.¹⁹⁶ So a surgeon may give opinion evidence as to the probable cause of the death.¹⁹⁷ And a surgeon may testify in his opinion that a death was not suicidal.^{197*} So it has been held that a person familiar by experience with the appearance or treatment of wounds may give an opinion as to the manner in which a mortal wound was probably inflicted.¹⁹⁸ So, also, as to the degree of force employed,¹⁹⁹ and also as to the direction of a blow.²⁰⁰ Evidence of the health of the deceased immediately before the infliction of the wound has been held admissible as showing whether death was caused by the wound.²⁰¹ It has also been held competent for a witness to state how deceased acted at the time he was said to be poisoned.²⁰² And it has been held not necessary to the admission of testimony regarding the analysis of the stomach of deceased that the stomach should be so preserved as to preclude the possibility of its being tampered with.²⁰³ Nor is it necessary that an analysis or microscopical examination should be made in order for one to testify as to blood stain.²⁰⁴

§ 3028. Articles in evidence.—When properly identified the following articles have been held admissible in evidence: bullets taken from the body of the deceased, or from trees or walls near the scene

643; *Basye v. State*, 45 Neb. 261, 63 N. W. 811.

¹⁹⁵ *State v. Clark*, 15 S. Car. 403; *State v. Harris*, 63 N. Car. 1.

¹⁹⁶ *State v. Jones*, 68 N. Car. 443; *State v. Merriman*, 34 S. Car. 16, 12 S. E. 619.

¹⁹⁷ *Commonwealth v. Thompson*, 159 Mass. 56, 33 N. E. 1111; *People v. Barker*, 60 Mich. 277, 27 N. W. 539, 1 Am. St. 501; *Boyle v. State*, 61 Wis. 440, 21 N. W. 289.

^{197*} *Everett v. State*, 62 Ga. 65.

¹⁹⁸ *Lemons v. State*, 97 Tenn. 560, 37 S. W. 552; *Rash v. State*, 61 Ala. 89; *People v. Fish*, 125 N. Y. 136, 26 N. E. 319; *State v. Asbell*, 57 Kans. 398, 46 Pac. 770; *Williams v. State*, 64 Md. 384, 1 Atl. 887; *Hopt v. Utah*, 120 U. S. 430, 7 Sup. Ct. 614.

And if shown to be caused by a pow-

erful blow it may be shown that the defendant is strong and powerful. *Thiede v. Utah Ter.*, 159 U. S. 510, 16 Sup. Ct. 62.

¹⁹⁹ *People v. Fish*, 125 N. Y. 136, 26 N. E. 319; *Thiede v. Utah Ter.*, 159 U. S. 510, 16 Sup. Ct. 62.

²⁰⁰ *Commonwealth v. Sturtivant*, 117 Mass. 122, 19 Am. R. 401; *Kennedy v. People*, 39 N. Y. 245; *Simon v. State*, 108 Ala. 27, 18 So. 731.

²⁰¹ *Phillips v. State*, 68 Ala. 469.

²⁰² *State v. David*, 131 Mo. 380, 33 S. W. 28.

²⁰³ *State v. Cook*, 17 Kans. 392.

²⁰⁴ *People v. Gonzales*, 35 N. Y. 49; *State v. Welch*, 36 W. Va. 690, 15 S. E. 419; *People v. Smith*, 112 Cal. 333, 44 Pac. 663; *State v. Bradley*, 67 Vt. 465, 32 Atl. 238.

of the killing;²⁰⁵ parts of the body of the deceased, such as the vertebræ and ribs;²⁰⁶ a door of the room in which the killing occurred, for the purpose of showing the location of bullets.²⁰⁷ Articles found on the body of the deceased;²⁰⁸ articles found at the place of the killing, which are shown to be the property of the accused;²⁰⁹ and the weapon which was used in committing the homicide.²¹⁰ And so, also, clothing identified as having been worn either by the deceased²¹¹ or by the defendant²¹² at the time of the homicide. So, in a recent case where it appeared that deceased and another, as officers, were attempting to arrest the defendant after night, and that he shot through a tin lantern held by one of the officers, hitting the deceased and killing him, it was held proper to admit in evidence the bullet taken from the body of the deceased, accompanied by a small piece of tin.²¹³ A witness familiar with firearms may testify that a gun or pistol belonging to the defendant had or had not been recently used.²¹⁴ But it has been held improper to allow experiments with weapons in the presence of the jury.²¹⁵ And testimony of witnesses as to certain

²⁰⁵ *Crawford v. State*, 112 Ala. 1, 21 So. 214; *Williams v. Commonwealth*, 85 Va. 607, 8 S. E. 470; *State v. Tippet*, 94 Iowa 646, 63 N. W. 445.

²⁰⁶ *Turner v. State*, 89 Tenn. 547.

²⁰⁷ *State v. Goddard*, 146 Mo. 177, 48 S. W. 82.

²⁰⁸ *People v. Irwin*, 77 Cal. 494, 20 Pac. 56; *King v. Commonwealth*, 35 Pa. L. J. 127.

²⁰⁹ *Thornton v. State*, 113 Ala. 43, 21 So. 356, 59 Am. St. 97; *Ruloff v. People*, 45 N. Y. 213; *Williams v. Commonwealth*, 85 Va. 607, 8 S. E. 470.

²¹⁰ *Ezell v. State*, 103 Ala. 8, 15 So. 818; *People v. Cox*, 76 Cal. 281, 18 Pac. 332; *Wynne v. State*, 56 Ga. 113; *Siberry v. State*, 133 Ind. 677, 33 N. E. 681; *State v. Jones*, 89 Iowa 182, 56 N. W. 427; *State v. Cushing*, 17 Wash. 544, 45 Pac. 145, 53 Am. St. 883; *State v. Roberts*, 63 Vt. 139, 21 Atl. 424; *Rodriguez v. State*, 32 Tex. Cr. App. 259, 22 S. W. 978.

²¹¹ *Burton v. State*, 107 Ala. 108, 18 So. 284; *People v. Durrant*, 116

Cal. 179, 48 Pac. 75; *Davidson v. State*, 135 Ind. 254, 34 N. E. 972; *State v. Winter*, 72 Iowa 627, 34 N. W. 475; *People v. Wright*, 89 Mich. 70, 50 N. W. 792; *State v. Symmes*, 40 S. Car. 383, 19 S. E. 16; *Head v. State*, 40 Tex. Cr. App. 265, 50 S. W. 552; *Venters v. State*, (Tex. Cr. App.) 83 S. W. 832; *State v. Cushing*, 14 Wash. 527, 45 Pac. 145, 53 Am. St. 883.

²¹² *State v. Stair*, 87 Mo. 268, 56 Am. R. 449; *People v. Neufeld*, 165 N. Y. 43, 58 N. E. 786; *State v. Baker*, 33 W. Va. 319, 10 S. E. 639; see generally, Vol. II, § 1223.

²¹³ *People v. Morales*, 143 Cal. 555, 77 Pac. 470.

²¹⁴ *Meyers v. State*, 14 Tex. App. 35; *People v. Driscoll*, 107 N. Y. 414, 14 N. E. 305; see also, as to opinions as to poison and blood stains and cause of death generally, Vol. II, §§ 1087, 1090.

²¹⁵ *United States v. Ball*, 163 U. S. 662, 16 Sup. Ct. 1192; *Polin v. State*, 14 Neb. 540, 16 N. W. 898.

holes in the clothing of deceased is not incompetent on the ground that the clothing is the best evidence.²¹⁶

§ 3029. Attendant circumstances—Res gestae.—Evidence of the attendant circumstances is admissible in so far at least as they are part of the *res gestae*, and, sometimes, such evidence has been permitted to take a very wide range. It is held to be competent in a case of homicide to put in evidence the conduct, actions and general behavior of the accused immediately before the killing, in order to show that he was armed and in a vicious humor, even though such testimony discloses another offense.²¹⁷ And it has been held that one who met the accused three-quarters of an hour after a murder, may testify that he appeared excited.²¹⁸ So testimony that when the witness entered the defendant's house, soon after the killing, the defendant was perspiring freely, has been held admissible.²¹⁹ And so evidence is admissible that when deceased was killed two persons ran rapidly away in the same direction, and that one said, as they ran past a bystander, "Will, you have killed him."²²⁰ It has been held that evidence that defendant, immediately after the crime with which he was charged, shot and killed another person, is admissible as part of the *res gestae*.²²¹ So evidence of the disturbances prior to the killing, and out of which it resulted, is also admissible.²²² And a witness for the state may be questioned on cross-examination as to whether he agreed to meet the deceased at a certain place and assist him in driving the accused off certain land.²²³ And notes that passed between the accused and the deceased on the day of the homicide, showing the beginning of the difficulty, have been held pertinent and admissible.²²⁴ But the facts and details of a civil suit between deceased and other parties are not competent evidence on a trial for homicide.²²⁵ It has been held that testimony as to where deceased was supposed to have been killed is admissible if merely for the purpose

²¹⁶ *Underwood v. Commonwealth*, (Ky.) 84 S. W. 310.

²¹⁷ *Kernan v. State*, 65 Md. 253, 4 Atl. 124.

²¹⁸ *Miller v. State*, 18 Tex. App. 232.

²¹⁹ *Prince v. State*, 100 Ala. 144, 14 So. 409, 46 Am. St. 28.

²²⁰ *Briggs v. Commonwealth*, 82 Va. 554.

²²¹ *Wilkerson v. State*, 31 Tex. Cr. App. 86, 19 S. W. 903.

²²² *People v. Curtis*, 52 Mich. 616, 18 N. W. 385.

²²³ *People v. Furtado*, 57 Cal. 345.

²²⁴ *Spivey v. State*, 58 Miss. 858.

²²⁵ *State v. Brooks*, 39 La. Ann. 817, 2 So. 498.

of locating the spot as a foundation for further examination.²²⁶ The state may also show as a part of the *res gestae* that deceased on the day of her death, was on her way to a neighbor's house, near which her body was found.²²⁷ Evidence that defendant's hands and knife, soon after the killing, were smeared with blood, is admissible, without proof of a chemical analysis of the substance on the hands and knife.²²⁸ The condition in which the body and clothing were found is admissible, being part of the *res gestae*.²²⁹ It is held that the state may show the condition of things at the house immediately after deceased's body is found.²³⁰ And evidence that the witness, soon after the shooting, saw blood on the ground, has been held admissible to identify the place of the murder.²³¹ But evidence that the accused repented the next day of his act and was forgiven by the deceased is inadmissible.²³² It has been held, however, that any acts showing a desire on the part of the accused to hide evidence of a crime, as by washing his hands or clothing to remove blood stains, or by hiding or destroying weapons, or his attempts to escape or his conduct when charged with the homicide are admissible and the jury may properly infer that they show a consciousness of his own guilt.²³³

§ 3030. Attendant circumstances — Declarations. — Declarations forming a part of the *res gestae* are admissible. Thus, statements by the deceased made before or immediately after the homicide, but connected with and explanatory of an act which led up to and prepared for it, are competent, usually for the purpose of showing his mental state and motives.²³⁴ So they may be admissible to show where he was going about the time of the homicide;²³⁵ and also to identify the defendant.²³⁶ So, where the day before deceased was killed at a

²²⁶ *People v. McDowell*, 64 Cal. 467, 3 Pac. 124.

²²⁷ *Tilley v. Commonwealth*, 89 Va. 136, 15 S. E. 526.

²²⁸ *Barbour v. Commonwealth*, 80 Va. 287.

²²⁹ *People v. Majors*, 65 Cal. 138, 3 Pac. 597, 52 Am. R. 295.

²³⁰ *Davidson v. State*, 135 Ind. 254, 34 N. E. 972.

²³¹ *People v. Minisci*, 12 N. Y. St. 719.

²³² *Murphy v. People*, 9 Colo. 435, 13 Pac. 528.

²³³ *Morris v. State*, 30 Tex. App. 95, 16 S. W. 757; *Batten v. State*, 80 Ind. 394.

²³⁴ *Boyle v. State*, 97 Ind. 322; *Harris v. State*, 96 Ala. 24, 11 So. 255; *State v. Harris*, 63 N. Car. 1; *Commonwealth v. Werntz*, 161 Pa. St. 591, 29 Atl. 272; *People v. Hawes*, 98 Cal. 648, 33 Pac. 791; *State v. Ridgely*, 2 Har. & McH. (Md.) 120, 1 Am. Dec. 372.

²³⁵ *State v. Vincent*, 24 Iowa 570.

²³⁶ *Cox v. State*, 8 Tex. App. 254.

particular place, and while on his way to that place, he stated that he was going there, and also stated his object in going, such statements have been held admissible as part of the *res gestae*.²³⁷ And declarations of the deceased made just before starting out, of his object and purpose in going to the house where he was killed, are admissible as part of the *res gestae*.²³⁸ Evidence as to the declarations made by the accused at the time the act was committed is admissible as part of the *res gestae*.²³⁹ But a statement made by the deceased fifteen minutes before the homicide and in the absence of defendant as to threats made by defendant, has been held not to be admissible as part of the *res gestae*.²⁴⁰ It has been held, however, that declarations made by the deceased immediately after the shooting are admissible as part of the *res gestae*. They are instinctive words, and are words of narration.²⁴¹ So declarations made by deceased during the affray in which he was killed are admissible as part of the *res gestae*.²⁴² But evidence of statements by deceased as to who inflicted the wound is not admissible, unless it forms a part of the *res gestae*, or is admissible as a dying declaration.²⁴³ So, a witness will not be allowed to testify as to declarations of deceased made some time after the fatal blow is given, unless the circumstances are such as to admit them as dying declarations.²⁴⁴ So, the declarations of the defendant, directly after the shooting, as to why he had shot deceased, have been held not part of the *res gestae* and not admissible.²⁴⁵ And statements made by the accused to third persons after the homicide had been committed are not admissible in evidence of his own behalf.²⁴⁶ And declarations of the accused made an hour after the time, and a mile from the place, of the homicide, are not admissible as part of the *res gestae*.²⁴⁷ Neither are statements of the accused made subsequent to the killing, after walking three or four miles, admissible as part of the *res gestae*.²⁴⁸ And declarations of a witness made half an hour

²³⁷ Kirby v. State, 7 Yerg. (Tenn.) 259.

²³⁸ Harris v. State, 96 Ala. 24, 11 So. 255.

²³⁹ State v. Walker, 77 Me. 488, 1 Atl. 357.

²⁴⁰ Montag v. People, 141 Ill. 75, 30 N. E. 337.

²⁴¹ State v. Euzebe, 42 La. Ann. 727, 7 So. 784.

²⁴² State v. Henderson, 24 Ore. 100, 32 Pac. 1030.

²⁴³ Lambright v. State, 34 Fla. 564, 16 So. 582.

²⁴⁴ State v. Wyse, 32 S. Car. 45, 10 S. E. 612.

²⁴⁵ King v. State, 65 Miss. 576, 5 So. 97, 7 Am. St. 681.

²⁴⁶ State v. Talbert, 41 S. Car. 526, 19 S. E. 852.

²⁴⁷ State v. Johnson, 35 La. Ann. 968.

²⁴⁸ People v. Callaghan, 4 Utah 49, 6 Pac. 49.

before the commission of the crime, are not a part of the *res gestae*, unless they are part of one continuous quarrel, culminating in the crime.²⁴⁹ And threats of the deceased towards the accused, made after the fatal wound, constitute no part of the *res gestae*.²⁵⁰ But some jurisdictions hold that declarations made by the deceased immediately after he was shot, although in the absence of the defendant, are admissible as part of the *res gestae*.²⁵¹ Thus, declarations of the deceased that accused shot him, made fifteen or twenty minutes after the shooting, and as soon as the accused could speak, are admissible as part of the *res gestae*.²⁵² But declarations of the deceased's wife, who witnessed the killing, made one hour thereafter, to the effect that she recognized defendant as the person who killed deceased, are not admissible as a part of the *res gestae*.²⁵³ And evidence of what defendant said to a witness about the shooting three hours after it occurred is not admissible as a part of the *res gestae*.²⁵⁴ The outcries of a person murdered during the same burglary at which deceased was killed have, however, been held admissible as part of the *res gestae*.²⁵⁵ Declarations of a bystander at the time of the killing have been held admissible as part of the *res gestae*.²⁵⁶ So, evidence of the shouts of the crowd with whom defendant was acting at the time of the shooting of deceased have been held admissible in some jurisdictions.²⁵⁷ But other jurisdictions hold that the remarks or threats of the crowd present at the killing are not any part of the *res gestae*.²⁵⁸

§ 3031. Dying declarations.—The subject of dying declarations is treated at considerable length in another part of this work.²⁵⁹ It is there shown that the rule admitting dying declarations applies only in criminal cases, and, generally, only in cases of homicide, that such declarations are really secondary or hearsay evidence, but are admitted in such cases under a limitation or qualification of the hearsay rule. The circumstances and marks of competency and the limita-

²⁴⁹ *Wood v. State*, 92 Ind. 269.

²⁵³ *State v. Wagner*, 61 Me. 178.

²⁵⁰ *Caw v. People*, 3 Neb. 357.

²⁵⁵ *United States v. Schneider*, 21

²⁵¹ *State v. Talbert*, 41 S. Car. 526, D. C. 381.

19 S. E. 852.

²⁵⁷ *Combs v. Commonwealth*, 15

²⁵² *Irby v. State*, 25 Tex. App. 203, Ky. L. R. 659, 25 S. W. 592.

7 S. W. 705.

²⁵⁹ *Holt v. State*, 9 Tex. App. 571.

²⁵³ *State v. Petty*, 21 Kans. 54.

²⁵⁸ See, Vol. I, Chap. XV, 443, et

²⁵⁴ *Evans v. State*, 58 Ark. 47, 22 seq., §§ 332, 359.

S. W. 1026.

tions upon their use are fully stated in the chapter to which reference has already been made. It will be sufficient, therefore, in this connection to call attention to some of the more recent decisions and to review some of the illustrative cases showing what dying declarations are admissible and when and under what circumstances they are or are not admitted.

§ 3032. **Dying declarations—When admissible.**—Statements made by deceased as to how the accused shot him after he had stated to the witness that he was satisfied that the wound would kill him, are admissible as dying declarations.²⁶⁰ So, a statement made by the deceased shortly after he was shot, that he had been shot to death, and that a negro shot him and a white man gave him the gun, has been held admissible as a dying declaration.²⁶¹ As elsewhere shown, dying declarations may be impeached, and statements made by the deceased after he was wounded, tending to contradict his dying declarations to others, given in evidence, are admissible for this purpose.²⁶² It has also been held that where the defendant did not do the killing, but was present with the one who did do it at the time, and there was evidence of a conspiracy connecting him therewith, dying declarations of deceased as to who did the shooting were admissible against such defendant.²⁶³ But it is held in Georgia and many other states that although two persons killed were shot in the same fight, the dying declarations of the one are not, as such, admissible in evidence on the trial of the slayer for the murder of the other.²⁶⁴ The fact

²⁶⁰ *Gregory v. State*, 140 Ala. 16, 37 So. 259; see also, *Gibson v. State*, 126 Ala. 59, 28 So. 673; *Jordan v. State*, 82 Ala. 1, 2 So. 460; *State v. Bowles*, 146 Mo. 6, 47 S. W. 892, 69 Am. St. 598; *Commonwealth v. Roddy*, 184 Pa. St. 274, 39 Atl. 211; *Commonwealth v. Matthews*, 89 Ky. 287, 12 S. W. 333.

²⁶¹ *State v. Bordelon*, 113 La. Ann. 690, 37 So. 603.

²⁶² *Gregory v. State*, 140 Ala. 16, 37 So. 259; *Dunn v. People*, 172 Ill. 582, 50 N. E. 137; *Nordgren v. People*, 211 Ill. 425, 71 N. E. 1042; *State v. Charles*, 111 La. Ann. 933, 36 So. 29; *Carver v. United States*, 164 U. S. 694, 17 Sup. Ct. 228; Vol. I, § 346;

but compare, *State v. Taylor*, 56 S. Car. 360, 34 S. E. 939; *Wroe v. State*, 20 Ohio St. 460.

²⁶³ *People v. Moran*, 144 Cal. 48, 77 Pac. 777.

²⁶⁴ *Taylor v. State*, 120 Ga. 857, 48 S. E. 361; see also, *State v. Westfall*, 49 Iowa 328; *Mora v. People*, 19 Colo. 255, 35 Pac. 179; *Brown v. Commonwealth*, 73 Pa. St. 321, 13 Am. R. 740; *State v. Fitzhugh*, 2 Ore. 227; *Radford v. State*, 33 Tex. Cr. App. 520, 27 S. W. 143; but compare, *State v. Wilson*, 23 La. Ann. 558; *State v. Terrell*, 12 Rich. L. (S. Car.) 321; *Rex v. Baker*, 2 Mood. & R. N. P. 53.

that there were eye-witnesses, or that there is other evidence as to the facts, does not render dying declarations inadmissible.²⁶⁵

§ 3033. Dying declarations—When not admissible.—Dying declarations, it is said in a recent case, are hearsay evidence, and are taken out of the rule excluding such evidence because of reasons of necessity, and because it is supposed that a realization on the part of the declarant of the certain and speedy approach of death affords as powerful incentive to tell the truth as does the administration of an oath.²⁶⁶ It is also held in the same case that in order to render them admissible, it must be first shown that the declarant was not only in articulo mortis, but under the sense of impending death without hope of recovery, at the time such declarations were made, and that statements made by the deceased that he had to die of the whipping he had received from the defendant, that any hour or any day he might die, do not sufficiently show his sense of impending death to render his statements competent as dying declarations.²⁶⁷ But in another recent case where a witness testified that the person making the dying declarations afterwards sought to be introduced, realized that he was mortally wounded, an objection that it was not shown that he knew at the time of making the declaration that he was in extremis²⁶⁸ was held to be without merit. A proper predicate must, however, be laid for the admission of such declarations when they are not admissible as part of the *res gestae*.²⁶⁹ Dying declarations are, in

²⁶⁵ *Lyles v. State*, (Tex. Cr. App.) 86 S. W. 763; *People v. Beverly*, 108 Mich. 509, 66 N. W. 379; *State v. Yee Wee*, 7 Idaho 188, 61 Pac. 588; Vol. I, § 359. For other cases of dying declarations held admissible, see, *Boyd v. State*, (Miss.) 36 So. 525; *Zipperian v. People*, (Colo.) 79 Pac. 1018 (both oral and written); *Lane v. State*, 151 Ind. 511, 51 N. E. 1056 (same); *Shenkenberger v. State*, 154 Ind. 630, 57 N. E. 519.

²⁶⁶ *State v. Knoll*, (Kans.) 77 Pac. 580. The fact that there were eye-witnesses does not, however, prevent the reception of dying declarations. *Lyles v. State*, (Tex. Cr. App.) 86 S. W. 763.

²⁶⁷ See also, *State v. Gianfala*, 113

La. Ann. 463, 37 So. 30; *Rex v. Abbott*, (1903) 67 J. P. 151.

²⁶⁸ *Davis v. State*, 120 Ga. 843, 48 S. E. 305; see also, *Pitts v. State*, 140 Ala. 70, 37 So. 101; *Fuqua v. Commonwealth*, 26 Ky. L. R. 420, 81 S. W. 923; *Connell v. State*, (Tex. Cr. App.) 81 S. W. 746; *Crockett v. State*, (Tex. Cr. App.) 77 S. W. 4; *Hawkins v. State*, 98 Md. 355, 57 Atl. 27; *State v. Gray*, 43 Ore. 446, 74 Pac. 927.

²⁶⁹ *Wilson v. State*, 140 Ala. 43, 37 So. 93; *Sutherland v. State*, (Ga.) 48 S. E. 915; as to whether the question of the sufficiency of the predicate is for the judge or jury, see and compare, *Sims v. State*, 139 Ala. 74, 36 So. 138; *Commonwealth*

general, admissible only as to such facts as the declarant could have testified to if he had been living and testified at the trial.²⁷⁰ It has been held error to permit a witness to testify that the deceased stated that "they murdered me without cause,"²⁷¹ or that "Bill Harris is my friend, and I don't want nothing done to him."²⁷²

§ 3034. Confessions.—The subject of confessions, like that of dying declarations, has already been fully discussed in another part of this work.²⁷³ All that is necessary in this connection, therefore, is to review some of the more recent decisions, applying the rules already considered, in cases of homicide. In a prosecution for murder, a confession freely and voluntarily made by the defendant is admissible as in other criminal cases.²⁷⁴ The following rules upon the subject are laid down in a recent case.²⁷⁵ When the proof of death is direct and positive and the circumstances are such as to leave no room for doubt that the deceased was murdered, any extrajudicial confession by the accused may be admitted in evidence to establish his connection with the crime; where the whole of a written confession admitting the crime charged and other crimes, is offered in evidence and objected to by the defendant, it is not error to allow the whole confession to go to the jury under instructions that it is admitted only to prove the killing of the person named in the indictment and that the jury should not permit the statements in the con-

v. Lawson, 25 Ky. L. R. 2187, 80 S. W. 206; Bateson v. State, (Tex. Cr. App.) 80 S. W. 88; see generally, Vol. I, §§ 355, 356.

²⁷⁰ Connell v. State, (Tex. Cr. App.) 81 S. W. 746; Montgomery v. State, 80 Ind. 338, 41 Am. R. 815; Vol. I, §§ 339, 350. Evidence held admissible as part of *res gestae* in, People v. Glover, 141 Cal. 233, 74 Pac. 745.

²⁷¹ Bateson v. State, (Tex. Cr. App.) 80 S. W. 88.

²⁷² State v. Harris, 112 La. Ann. 937, 36 So. 810; for other illustrative cases, see, People v. Schievi, 96 App. Div. 479, 89 N. Y. S. 564; State v. Wood, 53 Vt. 560; State v. Moody, 18 Wash. 165, 51 Pac. 356 (prior threats); State v. Eddon, 8 Wash.

292, 36 Pac. 139; Sullivan v. State, 102 Ala. 135, 15 So. 264, 48 Am. St. 22; declarations of the deceased to the effect that the defendant had given her some medicine, and that it had killed her, and that she was bound to die, made while she was going about, and evidently not in a realization that she was in extremis, were held inadmissible as dying declarations in, Brown v. Commonwealth, 26 Ky. L. R. 1269, 83 S. W. 645.

²⁷³ See, Vol. I, §§ 271-296.

²⁷⁴ Plant v. State, 140 Ala. 52, 37 So. 159; Wilson v. United States, 162 U. S. 613, 16 Sup. Ct. 895; see also, Vol. I, §§ 273-287.

²⁷⁵ State v. Knapp, 70 Ohio St. 380, 71 N. E. 705.

fession to prejudice them against the defendant; and where facts proved by the state corroborate the confession of the accused, direct and positive evidence of the corpus delicti is not indispensable to the admission of the confession, and if extrinsic corroborative facts, considered with the confession, persuade the jury beyond a reasonable doubt of the prisoner's guilt, the evidence will support a verdict of guilty. The mere fact that the defendant was under arrest or in custody when he made the confession does not render it inadmissible.²⁷⁶ And in the absence of any statutory provision upon the subject, it seems that failure to caution a prisoner, when he appears before a magistrate and makes incriminating statements in answer to questions, does not operate to exclude them where they were voluntary, and not the product of hope or fear, incited by some word or act of those in authority.²⁷⁷ But no improper inducement must be used, and the confession must be freely and voluntarily made.²⁷⁸ Confessions of defendants, induced by hanging them and threatening their lives unless they confess, are, of course, incompetent.²⁷⁹ But a voluntary confession of the accused was held admissible in a recent case, notwithstanding he was a negro and a prisoner at the time in a "calaboose" which was surrounded by a crowd of white men.²⁸⁰ In another recent case a homicide had been committed, and the husband of the deceased was arrested for the crime and brought to the police station, and his son, four years old, was brought to the station house, and in the presence of his father, on being asked as to the circumstances of the killing, he said that his father struck his mother with scissors. The court held evidence of such statement was inadmissible to show that the father by his silence at the time confessed the guilt.²⁸¹ The accused is usually entitled, when an alleged confession is introduced, to have the entire statement admitted.²⁸²

§ 3035. Previous circumstances—Threats, preparations and previous attempts.—The threats of the accused made previous to the homi-

²⁷⁶ State v. Worthen, (Iowa) 100 N. W. 330; Calloway v. State, 103 Ala. 27, 15 So. 821; Commonwealth v. Sheehan, 163 Mass. 170, 39 N. E. 791; Vol. I, § 287.

²⁷⁷ State v. Hand, (N. J.) 58 Atl. 641; see also, Vol. I, § 279.

²⁷⁸ Vol. I, § 273, et seq.

²⁷⁹ Edmonson v. State, (Ark.) 82 S. W. 203.

²⁸⁰ Hilburn v. State, (Ga.) 49 S. E. 318.

²⁸¹ Geiger v. State, 70 Ohio St. 400, 71 N. E. 721.

²⁸² State v. Busse, (Iowa) 100 N. W. 536; Williams v. State, 103 Ala. 33, 15 So. 662; Vol. I, § 295.

cide are admissible against him,²⁸³ in a proper case. And, even though they had not been communicated to the deceased, threats made by the defendant previous to the homicide, are competent for the purpose of showing malice.²⁸⁴ Thus the threats made by the defendant against the deceased are admissible as tending to prove the malice charged in the indictment,²⁸⁵ or as showing the defendant's disposition and feeling towards the deceased.²⁸⁶ And where the deceased had instituted a criminal prosecution against the accused and the latter had used threats against the former, evidence thereof was held admissible to show malice and premeditation.²⁸⁷ So, in another case threatening language used was held competent to prove that the intent was premeditated.²⁸⁸ And threats running through many months down to a time just prior to the killing are competent on the question of malice.²⁸⁹ But the defendant's threat against a certain person with whom he had been quarreling are not competent

²⁸³ *Myers v. State*, 62 Ala. 599; *Painter v. People*, 147 Ill. 444, 35 N. E. 64; *Cluck v. State*, 40 Ind. 263; *State v. McKinney*, 31 Kans. 570, 3 Pac. 356; *State v. Harrod*, 102 Mo. 590, 15 S. W. 373; *Commonwealth v. Crossmire*, 156 Pa. St. 304, 27 Atl. 40; *Bryant v. State*, 35 Tex. Cr. App. 394, 33 S. W. 978; see also, Vol. I, §§ 163, 164.

²⁸⁴ *Wilson v. State*, 110 Ala. 1, 20 So. 415, 55 Am. St. 17; *Phillips v. State*, 62 Ark. 119, 34 S. W. 539; *People v. Dice*, 120 Cal. 189, 52 Pac. 477; *Moore v. People*, 26 Colo. 213, 57 Pac. 857; *State v. Hoyt*, 46 Conn. 330; *Milton v. State*, 40 Fla. 251, 24 So. 60; *McDaniel v. State*, 100 Ga. 67, 27 S. E. 158; *State v. Davis*, 6 Idaho 159, 53 Pac. 678; *McCoy v. People*, 175 Ill. 224, 51 N. E. 777; *Cluck v. State*, 40 Ind. 263; *State v. Sullivan*, 51 Iowa 142, 50 N. W. 572; *Nichols v. Commonwealth*, 11 Bush (Ky.) 575; *State v. Pain*, 48 La. Ann. 311, 19 So. 138; *Commonwealth v. Holmes*, 157 Mass. 233, 32 N. E. 6, 34 Am. St. 270; *People v. Curtis*, 52 Mich. 616, 18 N. W. 385; *Burt v. State*, 72 Miss. 408, 16 So. 342, 48

Am. St. 563; *State v. Wright*, 141 Mo. 333, 42 S. W. 934; *State v. Sloan*, 22 Mont. 293, 56 Pac. 364; *State v. Bonds*, 2 Nev. 265; *State v. Palmer*, 65 N. H. 216, 20 Atl. 6; *People v. Decker*, 157 N. Y. 186, 51 N. E. 1018; *State v. Matthews*, 80 N. Car. 417; *Stewart v. State*, 1 Ohio St. 66; *State v. Powers*, 10 Ore. 145, 45 Am. R. 138; *Commonwealth v. Major*, 198 Pa. St. 290, 47 Atl. 741, 82 Am. St. 803; *State v. Lee*, 58 S. Car. 335, 36 S. E. 706; *Rea v. State*, 8 Lea (Tenn.) 356; *Strange v. State*, 38 Tex. Cr. App. 280, 42 S. W. 551; *State v. Bradley*, 67 Vt. 465, 32 Atl. 238; *White v. Territory*, 3 Wash. Ter. 397, 19 Pac. 37.

²⁸⁵ *Babcock v. People*, 13 Colo. 515, 22 Pac. 817; *State v. Pain*, 48 La. Ann. 311, 19 So. 138.

²⁸⁶ *State v. Sullivan*, 51 Iowa 142, 50 N. W. 572; *State v. Stackhouse*, 24 Kans. 445.

²⁸⁷ *State v. Birdwell*, 36 La. Ann. 859.

²⁸⁸ *People v. Brunt*, 11 N. Y. St. 59.

²⁸⁹ *Rains v. State*, 88 Ala. 91, 7 So. 315.

on his trial for killing another person in another quarrel, there being no connection between the two.²⁹⁰ In some jurisdictions it is held that a threat to kill "some one" is sufficient,²⁹¹ although not expressly directed against the deceased. Thus, the statements of the accused made shortly before the killing, to the effect that he was going to kill "somebody," without designating whom, have been held admissible.²⁹² A threat need not name the person threatened, where the other facts adduced give "individuation" to it.²⁹³ Thus, evidence is admissible of threats of violence made by the accused shortly before the homicide against "policemen," though not particularly against the deceased,²⁹⁴ who was a policeman. And so evidence that the accused stated, a short time before the alleged killing, that he intended to get even or square with somebody, without naming the person, has been held competent.²⁹⁵ And evidence of a statement by the accused a few hours before the homicide that he intended to have satisfaction before he slept that night, has also been held admissible against him.²⁹⁶ But the true rule as deduced from the decisions seems to be that in order for threats to be admissible they must either show a determination to injure some particular person or must be statements of ill-will or hate towards a class of which the person killed is one, and must be capable of being construed to refer to the deceased.²⁹⁷ Evidence that, a week before the homicide, defendant said to a third person that he would "fix" deceased has been held competent.²⁹⁸ And it has been held that the prosecution may show that the accused was looking and inquiring for deceased a short

²⁹⁰ *Abernethy v. Commonwealth*, 101 Pa. 322.

²⁹¹ *Hopkins v. Commonwealth*, 50 Pa. St. 9, 88 Am. Dec. 518; *Benedict v. State*, 14 Wis. 423; see also, *State v. Hoyt*, 47 Conn. 518, 36 Am. R. 89.

²⁹² *Benedict v. State*, 14 Wis. 423; *Hopkins v. Commonwealth*, 50 Pa. St. 9, 88 Am. Dec. 518; but compare, *Abernethy v. Commonwealth*, 101 Pa. St. 322, 328, distinguishing the last case above cited.

²⁹³ *Hardy v. State*, 31 Tex. Cr. App. 289, 20 S. W. 561; *Wharton Cr. Ev.*, (9th ed.) § 756.

²⁹⁴ *Dixon v. State*, 13 Fla. 636; *State v. Grant*, 79 Mo. 113, 49 Am. R. 218.

²⁹⁵ *State v. Harlan*, 130 Mo. 381, 32 S. W. 997.

²⁹⁶ *State v. Russell*, 91 N. Car. 624.

²⁹⁷ *Jordan v. State*, 79 Ala. 9; *Billings v. State*, 52 Ark. 303, 12 S. W. 574; *People v. Gross*, 123 Cal. 389, 55 Pac. 1054; *Parker v. State*, 136 Ind. 284, 35 N. E. 1105; *State v. Pierce*, 90 Iowa 506, 58 N. W. 891; *State v. Fitzgerald*, 130 Mo. 407, 32 S. W. 1113; *State v. Hymer*, 15 Nev. 49; *Hardy v. State*, 31 Tex. Cr. App. 289, 20 S. W. 561; *Snodgrass v. Commonwealth*, 89 Va. 679, 17 S. E. 238.

²⁹⁸ *White v. State*, 32 Tex. Cr. App. 625, 25 S. W. 784.

time before the killing, and what he said at the time in regard to deceased.²⁹⁹ The probative force of threats is a question for the jury, depending upon the circumstances under which they were made, whether or not repeated, the intervening time, whether or not there was an opportunity for carrying them into effect and other such circumstances.³⁰⁰ And whether or not such threats refer to the deceased is a question for the jury, to be considered with the other evidence.³⁰¹ But the question of the remoteness of the threats is held to be a question for the court in the exercise of a sound discretion.³⁰² It has been held proper to show that, a few days before the killing, defendant bought a gun and some shot like those taken from the wound which killed deceased.³⁰³ And evidence that the accused and his accomplice practiced shooting at a mark before the murder has likewise been held competent.³⁰⁴ So evidence was held competent that the accused bought some strychnine the previous year where the charge was for murder by poisoning with strychnine.³⁰⁵ But it has been held that mere threats to kill another, not connected with any other evidence joining the party with the commission of the homicide he threatened to commit, do not constitute a sufficient basis upon which the jury may find a verdict of guilty.³⁰⁶ And it has also been held that declarations by the deceased of peaceful intent, communicated to defendant, are admissible in rebuttal of evidence of previous threats by the deceased against the defendant.³⁰⁷

§ 3036. Previous circumstances—Some others.—Evidence as to previous quarrels and ill feelings is usually competent, and an admission by the accused that he had a previous difficulty with deceased has been held competent against him as tending to establish malice

²⁹⁹ *State v. Horne*, 9 Kans. 119.

³⁰⁰ *Beavers v. State*, 103 Ala. 36, 15 So. 616; *People v. Hong Ah Duck*, 61 Cal. 387; *State v. Hoyt*, 46 Conn. 330; *Harris v. State*, 109 Ga. 280, 34 S. E. 583; *Bolzer v. People*, 129 Ill. 112, 21 N. E. 818; *Goodwin v. State*, 96 Ind. 550; *State v. Wright*, 141 Mo. 333, 42 N. W. 934.

³⁰¹ *State v. Belton*, 24 S. Car. 185, 58 Am. R. 245; *State v. Crabtree*, 111 Mo. 136, 20 S. W. 7.

³⁰² *Commonwealth v. Holmes*, 157

Mass. 233, 32 N. E. 6, 34 Am. St. 270.

³⁰³ *McLean v. State*, 1 Tenn. Cas. 478.

³⁰⁴ *People v. McGuire*, 135 N. Y. 639, 32 N. E. 146.

³⁰⁵ *State v. Cole*, 94 N. Car. 958.

³⁰⁶ *Bailey v. State*, 104 Ga. 530, 30 S. E. 817; *Jones v. State*, 57 Miss. 684; *State v. Glahn*, 97 Mo. 679, 11 S. W. 260.

³⁰⁷ *Taylor v. State*, (Ga.) 49 S. E. 303.

or motive.³⁰⁸ And evidence of a previous difficulty between the accused and deceased has been held admissible to show express malice, whether it be proved that the ill feeling continued until the homicide or not.³⁰⁹ So testimony of a pre-existing enmity or a previous quarrel or grudge may be admissible to prove malice,³¹⁰ as is evidence that the accused had bad feelings against the deceased on account of some disputed account.³¹¹ So evidence of a meeting and altercation between the parties earlier in the evening of the killing is admissible.³¹² The nearness or remoteness of the difficulty and its apparent connection or lack of connection as a cause or with the cause of the homicide may, however, largely determine the question of the admissibility of evidence concerning it. Thus, on a murder trial evidence of a difficulty between the deceased and the defendant three weeks before the killing, was held admissible as bearing upon the question of malice;³¹³ while a quarrel occurring several months before the homicide, and not connected with the cause occasioning it, was held not to be admissible.³¹⁴ Upon the question of motive or malice, however, the line is not very closely drawn, and something is left to the discretion of the court in admitting evidence of the character under consideration, notwithstanding it goes back for a considerable time. Thus, it has been held that the admission in evidence in a murder case of ill-feeling on the part of defendant, extending back two years before the homicide, cannot be said to exceed the limits of the court's discretion.³¹⁵ So, where one was charged with murdering his wife, evidence of quarrels between them, two or more years before, was held admissible.³¹⁶ In many other cases evidence of previous menaces,³¹⁷ and previous assaults and threats to kill or the like has been held admissible in order to prove malice or intent.³¹⁸ Thus, evidence of assaults and threats by the prisoner on the prosecutor prior to the one for which the prisoner is indicted has been held admissible to show intent in a prosecution for

³⁰⁸ *Finch v. State*, 81 Ala. 41, 1 So. 565.

³⁰⁹ *Starke v. State*, 81 Ga. 593, 7 S. E. 807.

³¹⁰ *State v. D'Angelo*, 9 La. Ann. 46.

³¹¹ *State v. Gooch*, 94 N. Car. 987.

³¹² *White v. State*, 30 Tex. App. 652, 18 S. W. 462.

³¹³ *Brown v. State*, 51 Ga. 502.

³¹⁴ *Pound v. State*, 43 Ga. 88; see

also, *State v. Baker*, 30 La. Ann. 1134.

³¹⁵ *People v. Bemis*, 51 Mich. 422, 16 N. W. 794.

³¹⁶ *Sayres v. Commonwealth*, 88 Pa. St. 291; *Koerner v. State*, 98 Ind. 7.

³¹⁷ *Anderson v. State*, 15 Tex. App. 447.

³¹⁸ *Painter v. People*, 147 Ill. 444, 35 N. E. 64.

assault with intent to murder;³¹⁹ and so has evidence of the conduct and feelings of defendant towards his victim, and that he had made previous threats to kill his victim.³²⁰ And the fact that the defendant on the morning of the murder had his knife pointed with which he afterwards committed the crime, is competent evidence upon the question of deliberation and intent.³²¹ So evidence that the defendant purchased a gun a few weeks before the homicide, and practiced with it, is admissible as showing the condition of his mind, and the animus with which the act was done.³²² It has been held that evidence that defendant started towards deceased without a gun and went back and got it on the advice of his brother, who stated that he was satisfied that deceased had a pistol, is admissible to overcome the state's theory that defendant, when he started, intended to kill deceased.³²³ There is a long line of decisions to the effect that evidence of the relations and feelings existing between the accused and the deceased is admissible.³²⁴ Likewise there is a line of decisions to the effect that the state may introduce evidence of previous ill-treatment, quarrels and difficulties, for the purpose of determining the existence of malice or motive.³²⁵ But it may be stated as a general

³¹⁹ Gray v. State, 63 Ala. 66.

³²⁰ People v. Jones, 99 N. Y. 667, 2 N. E. 49.

³²¹ Walsh v. People, 88 N. Y. 458.

³²² Bolling v. State, 54 Ark. 588, 16 S. W. 658; People v. McGuire, 135 N. Y. 639, 32 N. E. 146.

³²³ Simmons v. State, 31 Tex. Cr. App. 227, 20 S. W. 573.

³²⁴ Allen v. State, 111 Ala. 80; 20 So. 490; Phillips v. State, 62 Ark. 119, 34 So. 539; People v. M'Kay, 122 Cal. 628, 55 Pac. 594; Shaw v. State, 60 Ga. 246; Simons v. People, 150 Ill. 66, 36 N. E. 1019; Pettit v. State, 135 Ind. 393, 34 N. E. 1118; State v. Helm, 97 Iowa 378, 66 N. W. 751; O'Brien v. Commonwealth, 89 Ky. 354, 12 S. W. 471; State v. Fontenot, 48 La. Ann. 305, 19 So. 113; State v. Savage, 69 Me. 112; Garlitz v. State, 71 Md. 293, 18 Atl. 39; Commonwealth v. Holmes, 157 Mass. 233, 32 N. E. 6, 34 Am. St. 270; People v. Parmelee, 112 Mich. 291, 70

N. W. 577; State v. Lentz, 45 Minn. 177, 47 N. W. 720; Webb v. State, 73 Miss. 456, 19 So. 238; State v. Tettaton, 159 Mo. 354, 60 S. W. 743; People v. Benham, 160 N. Y. 402, 55 N. E. 11; State v. Gooch, 94 N. Car. 987; State v. Ingram, 23 Ore. 434, 31 Pac. 1049; Commonwealth v. Krause, 193 Pa. St. 306, 44 Atl. 454; State v. Senn, 32 S. Car. 392, 11 S. E. 292; Burnett v. State, 14 Lea (Tenn.) 439; Turner v. State, 33 Tex. Cr. App. 103, 25 S. W. 635; Boyle v. State, 61 Wis. 440, 21 N. W. 289.

³²⁵ Finch v. State, 81 Ala. 41, 1 So. 565; People v. Chaves, 122 Cal. 134, 54 Pac. 596; State v. Green, 35 Conn. 203; Starke v. State, 81 Ga. 593, 7 S. E. 807; Painter v. People, 147 Ill. 444, 35 N. E. 64; Koerner v. State, 98 Ind. 7; State v. Helm, 97 Iowa 378, 66 N. W. 751; State v. O'Neil, 51 Kans. 651, 33 Pac. 287; Thomas v. Commonwealth, 14 Ky. L. R. 288, 20 S. W. 226; Williams v. State, 64 Md.

rule that the defendant will not be allowed in the first instance to bring in testimony concerning previous quarrels and troubles,³²⁶ at least where there is no question of self-defense or the like. Yet such testimony will be admitted when it tends to show self-defense, and there is doubt as to which of the parties commenced the fatal quarrel.³²⁷ It is held everywhere that inquiries into the particulars, details or merits of previous quarrels or difficulties are not competent.³²⁸ And evidence as to the relations and feelings, or the occurrence of a previous difficulty between the defendant or the deceased and some other person is as a general rule incompetent; that is, only facts concerning difficulties between the defendant and the deceased are usually competent.³²⁹

§ 3037. **Proceedings at inquest.**—The proceedings before the coroner are not in most jurisdictions admissible in evidence³³⁰ on the trial

384, 1 Atl. 887; Commonwealth v. Storti, 177 Mass. 339, 58 N. E. 1021; Herman v. State, 75 Miss. 340, 22 So. 823; State v. Dettner, 124 Mo. 426, 27 S. W. 1117; People v. Benham, 160 N. Y. 402, 55 N. E. 11; State v. Rash, 12 Ired. L. (N. Car.) 382, 55 Am. Dec. 420; Commonwealth v. Crossmire, 156 Pa. St. 304, 27 Atl. 40; Stone v. State, 4 Humph. (Tenn.) 27; State v. Bradley, 67 Vt. 465, 32 Atl. 238; Nicholas v. Commonwealth, 91 Va. 741, 21 S. E. 364; State v. Ackles, 8 Wash. 462, 36 Pac. 597; Boyle v. State, 61 Wis. 440, 21 So. 289.

³²⁶ Kilgore v. State, 124 Ala. 24, 27 So. 4; Foster v. State, 70 Miss. 755, 12 So. 822; State v. Sullivan, 51 Iowa 142, 50 N. W. 572; State v. Cooper, 32 La. Ann. 1084.

³²⁷ Holley v. State, 39 Tex. Cr. App. 301, 46 S. W. 39; State v. Peterson, 24 Mont. 81, 60 Pac. 809; State v. Sorter, 52 Kans. 531, 34 Pac. 1036; People v. Hecker, 109 Cal. 453, 42 Pac. 307; Coxwell v. State, 66 Ga. 309; Gunter v. State, 111 Ala. 23, 20 So. 632; State v. Seymour, 94 Iowa 699, 63 N. W. 661; Austin v. Com-

monwealth, 19 Ky. L. R. 474, 40 S. W. 905; Marnoch v. State, 7 Tex. App. 269.

³²⁸ Rutledge v. State, 88 Ala. 85, 7 So. 335; People v. Thomson, 92 Cal. 506, 28 Pac. 589; People v. Yokum, 118 Cal. 437, 50 Pac. 686; State v. Anderson, 45 La. Ann. 651, 12 So. 737; State v. Sorter, 52 Kans. 531, 34 Pac. 1036.

³²⁹ Bird v. United States, 180 U. S. 356, 21 Sup. Ct. 403; Dabney v. State, 113 Ala. 38, 21 So. 211, 59 Am. St. 92; People v. Mitchell, 100 Cal. 328, 34 Pac. 698; Hirschman v. People, 101 Ill. 568; Pettit v. State, 135 Ind. 393, 34 N. E. 1118; Caskey v. Commonwealth, 15 Ky. L. R. 257, 23 S. W. 368; State v. Bowser, 42 La. Ann. 936, 8 So. 474; People v. Simpson, 48 Mich. 474, 12 N. W. 662; Mabry v. State, 71 Miss. 716, 14 So. 267; State v. Anderson, 4 Nev. 265; People v. Larubla, 140 N. Y. 87, 35 N. E. 412; Dorsey v. State, 34 Tex. 651.

³³⁰ State v. Row, 81 Iowa 138, 46 N. W. 872; Whitehurst v. Commonwealth, 79 Va. 556; Colquit v. State, 107 Tenn. 381, 64 S. W. 713; State

of an indictment for homicide. Thus it has been held that the minutes kept by a coroner of an inquest held by him are not competent evidence, and it is said that the facts contained in them should be proved by the testimony of the coroner.³³¹ And it has also been held that a written statement of the testimony of a witness given before the coroner cannot be received, although the witness has removed from the state.³³² But it has been held that the deposition of a witness taken at the coroner's inquest is admissible on behalf of the accused, when the witness has died since the inquest.³³³ And that a deposition of a witness at the coroner's inquest is admissible, on the trial of another person for the murder, to contradict such witness.³³⁴ So, the coroner's inquest held on the body of the deceased has been held competent evidence of the physical facts as to the death.³³⁵ And a deposition or statement made and signed by the accused before the coroner or committing magistrate may be competent against him as an admission or a confession, or at least to contradict him.³³⁶

§ 3038. Evidence as to character—Of deceased.—There is some conflict of authority as to whether evidence of the character of the person killed or assaulted is admissible on behalf of the accused. The weight of authority would seem to be that such evidence is not

v. Turner, Wright (Ohio) 20; Wheeler v. State, 34 Ohio St. 394, 398; but see, People v. Devine, 44 Cal. 452; Haines v. State, 109 Ga. 526, 35 S. E. 141; State v. Jones, 29 S. Car. 227, 7 S. E. 296; there is considerable conflict upon the general subject of receiving coroners' records and verdicts, and a distinction is sometimes made between the verdict and the other proceedings or records. Much depends upon the statute of the particular jurisdiction. See generally, Vol. II, § 1291, and Vol. III, § 2012.

³³¹ *Bass v. State, 29 Ark. 142; Payne v. State, 66 Ark. 545, 52 S. W. 276; State v. Hayden, 45 Iowa 11.*

³³² *Dupree v. State, 33 Ala. 380, 73 Am. Dec. 422. See also, Smith v. State, (Tex. Civ. App.) 85 S. W. 1153.*

³³³ *State v. McNeill, 33 La. Ann. 1332.*

³³⁴ *Wormeley v. Commonwealth, 10 Gratt. (Va.) 658.*

³³⁵ *State v. Parker, 7 La. Ann. 83; but not as to recital of facts as to the cause of death and the guilt of the accused. State v. Melville, 10 La. Ann. 456; State v. Tate, 50 La. Ann. 1183, 24 So. 592.*

³³⁶ *See, Rex v. Chappel, 1 Mood. & R. N. P. 395; Rex v. Hopes, 7 Car. & P. 136; Lambe's Case, 2 Leach Cr. Law (3d ed.) 625, 630; see also, Sage v. State, 127 Ind. 15, 26 N. E. 667; Epps v. State, 102 Ind. 539, 1 N. E. 491; Davidson v. State, 135 Ind. 254, 34 N. E. 972; Woods v. State, 63 Ind. 353; but compare, Dunn v. State, 2 Ark. 229, 35 Am. Dec. 54. See generally, Vol. II, § 1291, and note in 68 L. R. A. 285.*

usually admissible in the first instance.³³⁷ Thus, it is held that evidence is not admissible on the part of the accused as to the character of the deceased for peace and quietness.³³⁸ Nor can such evidence ordinarily be introduced by the state in the first instance.³³⁹ Yet while evidence of the quiet, peaceable disposition, or sober and industrious habits of the deceased, or of his general reputation as a good man cannot be proved in the first instance, such evidence may be introduced by the state to rebut evidence attacking the character of the deceased presented by the accused.³⁴⁰ But where the general character of deceased was not attacked or put in issue by defendant it is held error to admit evidence on behalf of the state to sustain it.³⁴¹ Where the evidence tends to show that the accused acted in self-defense and was acquainted with the bad and quarrelsome character of the deceased, then such character of deceased may be shown in evidence.³⁴² Such evidence is admissible to show the defendant's state of mind and the reasonableness of his apprehension of violence,³⁴³ and when admissible

³³⁷ *Gardner v. State*, 90 Ga. 310, 17 S. E. 86, 35 Am. St. 202; *State v. McCarthy*, 43 La. Ann. 541, 9 So. 493; *Commonwealth v. Ferrigan*, 44 Pa. St. 386; *Gandolfo v. State*, 11 Ohio St. 114; *Garner v. State*, 28 Fla. 113, 9 So. 835; *Underhill Cr. Ev.*, § 324; *Fields v. State*, 47 Ala. 608, 11 Am. R. 771.

³³⁸ *People v. Munn*, (Cal.) 7 Pac. 790.

³³⁹ *Parker v. Commonwealth*, 96 Ky. 212, 28 S. W. 500; *Roten v. State*, 31 Fla. 514, 12 So. 910; *Lemons v. State*, 97 Tenn. 560, 37 S. W. 552; *Ben v. State*, 37 Ala. 103; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 168; *State v. McCarthy*, 43 La. Ann. 541, 9 So. 493; *Moore v. State*, (Tex. Cr. App.) 79 S. W. 565; *State v. Eddon*, 8 Wash. 292, 36 Pac. 139.

³⁴⁰ *Lemons v. State*, 97 Tenn. 560, 37 S. W. 552; *Hussey v. State*, 87 Ala. 121, 6 So. 420; *People v. Powell*, 87 Cal. 348, 25 Pac. 481; *State v. Nash*, 45 La. Ann. 974, 13 So. 732, 734; *Ben v. State*, 37 Ala. 103; *Thrawley v. State*, 153 Ind. 375, 55

N. E. 95; *Martin v. State*, 44 Tex. Cr. App. 279, 70 S. W. 973; *Pettis v. State*, (Tex. Cr. App.) 81 S. W. 312; *Davis v. People*, 114 Ill. 86, 29 N. E. 192. But it is held that this should go to his reputation rather than to the actual fact that he was a dangerous man. *Stalcup v. State*, 146 Ind. 270, 45 N. E. 334; *People v. Anderson*, 39 Cal. 703.

³⁴¹ *Parker v. Commonwealth*, 96 Ky. 212, 28 S. W. 500; *State v. Eddon*, 8 Wash. 292, 36 Pac. 139.

³⁴² *People v. Lamb*, 2 Keyes (N. Y.) 360; *State v. Rollins*, 113 N. Car. 722, 18 S. E. 394; *People v. Powell*, 87 Cal. 348, 25 Pac. 481.

³⁴³ *Smith v. United States*, 161 U. S. 85, 16 Sup. Ct. 483; *Riley v. Commonwealth*, 94 Ky. 266, 22 S. W. 222; *Perry v. State*, 94 Ala. 25, 10 So. 650; *State v. Collins*, 32 Iowa 36; *State v. Shafer*, 22 Mont. 17, 55 Pac. 526; *Wesley v. State*, 37 Miss. 327, 75 Am. Dec. 62; *People v. Druse*, 103 N. Y. 655, 8 N. E. 733; *State v. McIver*, 125 N. Car. 645, 34 S. E. 439; *Upthegrove v. State*, 37 Ohio St. 662.

cannot prove the good character of his co-defendants.³⁶¹ After the defendant has put his character in evidence, the state may show his bad reputation with reference to the same traits of character.³⁶² So, it has been held competent for the state to show his character when drinking, when the homicide was committed by him while drinking.³⁶³ But it has been held that testimony of the good character of the accused cannot be met by evidence that he had formerly committed an act of violence against another person, at another place, and under different circumstances.³⁶⁴ It has also been held that the temper of the prisoner cannot be considered,³⁶⁵ and that evidence that the accused had a nervous temperament, and was excitable and eccentric, is not admissible.³⁶⁶

§ 3040. Evidence of habits and disposition.—Certain habits of the deceased may usually be shown under circumstances similar to those under which his character or reputation for peace or violence may be shown.³⁶⁷ Thus, it is often competent to prove that the deceased was in the habit of going armed or carrying deadly weapons.³⁶⁸ But it must usually be made to appear that the defendant had knowledge of such habit,³⁶⁹ and the evidence as to habit must not be too re-

³⁶¹ *Omer v. Commonwealth*, 95 Ky. 353, 25 S. W. 594.

³⁶² Vol. I, § 168.

³⁶³ *Cook v. State*, (Fla.) 35 So. 665; but see, *State v. McDaniel*, 68 S. Car. 304, 47 S. E. 384.

³⁶⁴ *Brownell v. People*, 38 Mich. 732; see also, *State v. Evans*, 158 Mo. 589, 59 S. W. 994.

³⁶⁵ *State v. Lipsey*, 3 Dev. (N. Car.) 485.

³⁶⁶ *Commonwealth v. Cleary*, 148 Pa. 26, 23 Atl. 1110.

³⁶⁷ See, *State v. Ellis*, 30 Wash. 369, 70 Pac. 963; *White v. State*, 100 Ga. 659, 28 S. E. 423; *State v. Yokum*, 14 S. Dak. 84, 84 N. W. 389; *People v. Grimes*, 132 Cal. 30, 64 Pac. 101; in *Phipps v. State*, 34 Tex. Cr. App. 560, 31 S. W. 397, it was held that evidence of the particular habit there sought to be shown could not be introduced be-

cause the defendant did not know of it.

³⁶⁸ *Wiley v. State*, 99 Ala. 146, 13 So. 424; *Cawley v. State*, 133 Ala. 128, 32 So. 227; *Naugher v. State*, 116 Ala. 463, 23 So. 26; *People v. Howard*, 112 Cal. 135, 44 Pac. 464; *Garner v. State*, 31 Fla. 170, 12 So. 638; *Riley v. Commonwealth*, 15 Ky. L. R. 46, 22 S. W. 222; *State v. Yokum*, 14 S. Dak. 84, 84 N. W. 389; *State v. Crawford*, 31 Wash. 260, 71 Pac. 1030. It has been held competent to show that such was his reputation and that he was nicknamed "Draws" from his readiness to draw weapons. *State v. Thompson*, 109 La. Ann. 296, 33 So. 320; see also, *Glenewinkel v. State*, (Tex. Cr. App.) 61 S. W. 123.

³⁶⁹ *Sims v. State*, 139 Ala. 74, 36 So. 138; *People v. Howard*, 112 Cal. 135, 44 Pac. 464; *Garner v. State*, 31

mote.³⁷⁰ So, in a case where there was no question of self-defense or the like, and the defendant's claim was that the deceased had committed suicide, evidence that the deceased was in the habit of carrying a pistol was held not admissible.³⁷¹ And it has been held that while the state may show the deceased was unarmed at the time of the homicide, it cannot show in the first instance that he was in the habit of going unarmed and had refused to arm himself.³⁷² But such evidence has been held admissible in rebuttal.³⁷³ Evidence that the deceased was a drinking man is generally immaterial and incompetent;³⁷⁴ but his character and disposition may be material and competent, as, for instance, in some cases where the homicide was committed under such circumstances.³⁷⁵ Evidence may be introduced by the accused to show that the deceased was of a melancholy temperament and inclined to suicide,³⁷⁶ where there is evidence to support that theory. And the prosecution, in rebuttal, may introduce testimony showing the happy disposition and good health, the social condition and pleasant surroundings of the deceased, to establish the absence of a suicidal intent.³⁷⁷ So, where the defendant in a prosecution for killing his father-in-law claimed that shortly prior to the homicide he had discovered the deceased in adultery with

Fla. 170, 12 So. 638; *Phipps v. State*, 34 Tex. Cr. App. 560, 31 S. W. 397.

³⁷⁰ *People v. Barthleman*, 120 Cal. 7, 52 Pac. 112.

³⁷¹ *State v. Fitzgerald*, 130 Mo. 407, 32 S. W. 1113; overruling, *State v. Ludwig*, 70 Mo. 412. In the syllabus in the S. W. Rep. this seems to be erroneously stated as applying to the defendant instead of the deceased. So it has been held incompetent for the defense to show that the deceased, who died from a pistol wound, was an expert with a pistol. *State v. Punshon*, 124 Mo. 448, 27 S. W. 1111.

³⁷² *People v. Powell*, 87 Cal. 348, 25 Pac. 481; see also, *McCandless v. State*, 42 Tex. Cr. App. 58, 57 S. W. 672, to the effect that the state cannot show this even in rebuttal of evidence that he did draw or attempt to draw a weapon at the time

of the homicide. Held also that the accused could not show it, in *State v. Chevallier*, 36 La. Ann. 81.

³⁷³ *State v. Mims*, 36 Ore. 315, 61 Pac. 888; *People v. Grimes*, 132 Cal. 30, 64 Pac. 101.

³⁷⁴ *Seaborn v. Commonwealth*, 25 Ky. L. R. 2203, 80 S. W. 223; see also, *State v. McDaniel*, 68 S. Car. 304, 47 S. E. 384.

³⁷⁵ *State v. Beird*, 118 Iowa 474, 92 N. W. 694; *Lewallen v. State*, 6 Tex. App. 475; see also, *State v. Ellis*, 30 Wash. 369, 70 Pac. 963; *State v. Hunter*, 118 Iowa 686, 92 N. W. 872; *Cook v. State*, (Fla.) 35 So. 665.

³⁷⁶ *Boyd v. State*, 14 Lea (Tenn.) 161; *Blackburn v. State*, 23 Ohio St. 146; *Hall v. State*, 132 Ind. 317, 31 N. E. 536.

³⁷⁷ *State v. Lentz*, 45 Minn. 177, 47 N. W. 720.

the defendant's wife, that fact being competent for the purpose of reducing the homicide to murder in the second degree, it was held that the defendant was entitled to show that deceased was a man of unchaste and immoral habits, for the purpose of proving that he would be likely to commit the offense alleged.³⁷⁸

§ 3041. Evidence as to self-defense.—Where a homicide occurs under such circumstances that it is doubtful whether the act was committed maliciously or from a well-grounded apprehension of danger, testimony showing that the deceased was turbulent, violent, and desperate is proper, in order to determine whether the accused had reasonable cause to apprehend great personal injury to himself.³⁷⁹ But evidence of the violent character of the deceased is not admissible to show reasonable ground for apprehensions without some proof that the killing was in self-defense.³⁸⁰ Thus, in the absence of proof of any assault or hostile demonstration by the deceased evidence of his dangerous character and disposition has often been held not to be admissible.³⁸¹ But it has been held that evidence of the defendant's reputation for peace or violence is to be considered by the jury in doubtful cases in determining who was the assailant.³⁸² Evidence of previous threats of the deceased against the accused is not admissible, unless there is some proof of an attack or overt hostile act showing an intent to carry the threats into execution.³⁸³ It has sometimes

³⁷⁸ *Orange v. State*, (Tex. Cr. App.) 83 S. W. 385.

³⁷⁹ *Williams v. State*, 74 Ala. 18; *Garner v. State*, 28 Fla. 113, 9 So. 835, 29 Am. St. 232; *State v. Graham*, 61 Iowa 608, 16 N. W. 743; *State v. Downs*, 91 Mo. 19, 3 S. W. 219; *Basye v. State*, 45 Neb. 261, 63 N. W. 811; *Nichols v. People*, 23 Hun (N. Y.) 165; *Marts v. State*, 26 Ohio St. 162; *Moore v. State*, 15 Tex. App. 1; *Smith v. United States*, 161 U. S. 85, 16 Sup. Ct. 483, and other authorities cited in ante section on character of deceased.

³⁸⁰ *Bowles v. State*, 58 Ala. 335; *State v. Claude*, 35 La. Ann. 71; *State v. Harris*, 59 Mo. 550; *People v. Hess*, 8 App. Div. (N. Y.) 143, 40 N. Y. S. 486.

³⁸¹ *Lang v. White*, 84 Ala. 1, 4 So. 193, 5 Am. St. 324; *Davidson v. People*, 4 Colo. 145; *Roten v. State*, 31 Fla. 514, 12 So. 910; *Doyal v. State*, 70 Ga. 134; *Cannon v. People*, 141 Ill. 270, 30 N. E. 1027; *State v. Stewart*, 47 La. Ann. 410, 16 So. 945; *People v. Hess*, 8 App. Div. (N. Y.) 143, 40 N. Y. S. 486; *West v. State*, 18 Tex. App. 640; *Smith v. United States*, 1 Wash. T. 262.

³⁸² *State v. Cushing*, 14 Wash. 527, 45 Pac. 145, 53 Am. St. 883, and other authorities cited, § 3038, on character of the deceased.

³⁸³ *Hughey v. State*, 47 Ala. 97; *People v. Campbell*, 59 Cal. 243, 43 Am. R. 257; *Steele v. State*, 33 Fla. 348, 14 So. 841; *State v. Stewart*, 47 La. Ann. 410, 16 So. 945; *State v.*

been stated, in general terms, that evidence of threats uncommunicated to the defendant is not admissible.³⁸⁴ Thus, it has been held that threats of deceased against the accused are not admissible in evidence, until it has been proved that the accused had been advised of them.³⁸⁵ But in these cases there was no pretense of self-defense; and it is generally held that evidence of uncommunicated threats by deceased is admissible in a proper case to show his mental attitude,³⁸⁶ and determine who was the aggressor.³⁸⁷ And in a recent case it is said that uncommunicated threats, according to the modern and better reasoned cases, are admissible in three instances, namely, to show who began the affray, to corroborate evidence of communicated threats, and to show the attitude of the deceased.³⁸⁸ So, where self-defense is pleaded it is generally held that the accused may testify in such cases as to his belief that his life was in danger.³⁸⁹ But the

Kenyon, 18 R. I. 217, 26 Atl. 199; West v. State, 18 Tex. App. 640; People v. Halliday, 5 Utah 467, 17 Pac. 118; State v. Spencer, 160 Mo. 118, 60 S. W. 1048, 83 Am. St. 463; note in 89 Am. St. 708.

³⁸⁴ Vann v. State, 83 Ga. 44, 9 S. E. 945.

³⁸⁵ State v. McCoy, 29 La. Ann. 593; see also, State v. Zellers, 7 N. J. L. 220; State v. Vaughn, 22 Nev. 285, 39 Pac. 733; State v. Warren, 1 Marv. (Del.) 487, 41 Atl. 190; State v. Lyons, 7 Idaho 530, 64 Pac. 236; Ellis v. State, 152 Ind. 327, 52 N. E. 82.

³⁸⁶ State v. Evans, 33 W. Va. 417, 10 S. E. 792.

³⁸⁷ Roberts v. State, 68 Ala. 156; People v. Tamkin, 62 Cal. 468; Holter v. State, 37 Ind. 57, 10 Am. R. 74; State v. Felker, 27 Mont. 451, 71 Pac. 668; State v. Turpin, 77 N. Car. 473, 24 Am. R. 455; State v. Tartar, 26 Ore. 38, 37 Pac. 53; State v. Cushing, 14 Wash. 527, 45 Pac. 145; Wiggins v. People, 93 U. S. 465; State v. Evans, 33 W. Va. 417, 10 S. E. 792; 89 Am. St. 709, note; but compare, People v. Arnold, 15 Cal. 476; Atkins v. State, 16 Ark. 568; Coker v.

State, 20 Ark. 53. As already shown, however, there must be a claim of self-defense and some evidence thereof.

³⁸⁸ Territory v. Hall, 10 N. Mex. 545, 62 Pac. 1083; see also, as to their admissibility to corroborate communicated threats, State v. Helm, 92 Iowa 540, 61 N. W. 246; State v. Brown, 22 Kans. 222; Cornellus v. Commonwealth, 54 Ky. 539; Levy v. State, 28 Tex. App. 203, 12 S. W. 596, 19 Am. St. 826.

³⁸⁹ Duncan v. State, 84 Ind. 204; Williams v. Commonwealth, 90 Ky. 596, 14 S. W. 595; Commonwealth v. Woodward, 102 Mass. 155; State v. Austin, 104 La. Ann. 409, 29 So. 23; Upthegrove v. State, 37 Ohio St. 662; but compare, Mann v. State, 134 Ala. 1, 32 So. 704; State v. Gonce, 87 Mo. 627. It has also been held that he may state what he thought the deceased intended to do. Wallace v. United States, 162 U. S. 466, 16 Sup. Ct. 850; Taylor v. People, 21 Colo. 426, 42 Pac. 652.

³⁹⁰ Hawkins v. State, 25 Ga. 207, 71 Am. Dec. 166; Gardner v. State, 90 Ga. 310, 17 S. E. 86, 35 Am. St. 202; Smith v. Commonwealth, 23 Ky. L.

opinions of third persons as to what the deceased intended to do,³⁹⁰ or that the defendant was in imminent danger and had just cause for apprehension of great bodily harm³⁹¹ are incompetent. Threats made by the deceased, a short time before the commission of the homicide, indicating an angry and revengeful spirit toward the accused and a determination to do violence to his person, which were communicated to the prisoner a short time before the killing, are admissible evidence in his favor,³⁹² where there is any evidence whatever fairly tending to support the issue of self-defense, and, possibly in other cases as well. On the issue of self-defense, the defendant, as stated in another section, may show that deceased carried deadly weapons,³⁹³ and was in the habit of so doing as the defendant knew. So on the issue of self-defense, defendant may show that deceased had time and again assaulted him,³⁹⁴ or the like,³⁹⁵ at least where the evidence as to self-defense leaves the matter in doubt or a sufficient preliminary showing has been otherwise made.³⁹⁶ And where self-defense is set up to justify a murder, the declarations of the deceased, explanatory of accompanying acts, are admissible as part of the *res gestae*.³⁹⁷ It has been held that one indicted for manslaughter may prove the purpose, as well as the reasonable cause, of the fatal blow alleged by him to have been struck in self-defense.³⁹⁸

R. 2271, 67 S. W. 32; *State v. Scott*, 26 N. Car. 409, 42 Am. Dec. 148.

³⁹¹ *Keener v. State*, 18 Ga. 194, 63 Am. Dec. 269; *State v. Rhoads*, 29 Ohio St. 171; *State v. Summers*, 36 S. Car. 479, 15 S. E. 369; see also, *Smith v. Commonwealth*, 23 Ky. L. R. 2271, 67 S. W. 32; *Gregory v. State*, (Tex. Cr. App.) 48 S. W. 577; *State v. Brooks*, 39 La. Ann. 817, 2 So. 498; *Lowman v. State*, 109 Ga. 501, 34 S. E. 1019; but compare, *Stewart v. State*, 19 Ohio 302, 53 Am. Dec. 426; *Thomas v. State*, 40 Tex. 36.

³⁹² *Powell v. State*, 52 Ala. 1; *State v. Scott*, 24 Kans. 68; *Jackson v. State*, 65 Tenn. 452; *State v. Dodson*, 4 Ore. 64; *State v. Abbott*, 8 W. Va. 741; *Harris v. State*, 72 Miss. 99, 16 So. 360; *State v. Harrod*, 102 Mo. 590, 15 S. W. 373; *Allison v. United States*, 160 U. S. 203, 16 Sup. Ct. 252;

Wallace v. United States, 162 U. S. 466, 16 Sup. Ct. 859.

³⁹³ *State v. Graham*, 61 Iowa 608, 16 N. W. 743.

³⁹⁴ *State v. Graham*, 61 Iowa 608, 16 N. W. 743; *State v. Sorter*, 52 Kans. 531, 34 Pac. 1036; *Enlow v. State*, 154 Ind. 664, 57 N. E. 539.

³⁹⁵ *Gunter v. State*, 111 Ala. 23, 20 So. 632, 56 Am. St. 17; *Commonwealth v. Booker*, 25 Ky. L. R. 1025, 76 S. W. 838; *People v. Hecker*, 109 Cal. 451, 42 Pac. 307, 30 L. R. A. 403; *State v. Peterson*, 24 Mont. 81, 60 Pac. 809; *State v. Dee*, 14 Minn. 35; *People v. Taylor*, 177 N. Y. 237, 69 N. E. 534.

³⁹⁶ See, *State v. Jefferson*, 43 La. Ann. 995, 10 So. 199; *State v. Smith*, 164 Mo. 567, 65 S. W. 270.

³⁹⁷ *Wilson v. People*, 94 Ill. 299.

³⁹⁸ *Commonwealth v. Woodward*, 102 Mass. 155.

But the fact that defendant, after the affray, requested a third person to go to the relief of the deceased, has no tendency to prove that the killing was done in self-defense.³⁹⁹ The prosecution may, of course, introduce proper evidence in rebuttal. Thus, the state may show that the deceased did not make threats as claimed.⁴⁰⁰ So, it has been held that they may be explained, and that it may be shown that his manner was not threatening.⁴⁰¹ It has also been held that subsequent friendly relations between the parties,⁴⁰² or the subsequent conduct and declarations of the deceased indicating his peaceable intentions may be shown,⁴⁰³ at least when known to the defendant.⁴⁰⁴ So, it has been held that the prosecution may prove the great physical superiority of the accused over the deceased.⁴⁰⁵

§ 3041a. Evidence as to self-defense—Justification or excuse.—As already intimated, while homicide may be justifiable when it is committed, without malice, in the performance of a legal duty or for the advancement of public justice, as where it is committed in making a lawful arrest, or in apprehending a criminal escaping from prison, or in preventing the commission of a felony,⁴⁰⁶ yet the question of justification is usually determined by the consideration as to whether the homicide was necessary or apparently necessary to accomplish such lawful purpose or legal duty. So, in determining whether the homicide was excusable as committed in self-defense the rule is substantially the same. If committed in the necessary defense of the defendant's person or habitation or in necessary defense of one to whom he owes the duty of protection, it is a good defense whether it be called merely excusable or justifiable.⁴⁰⁷ Indeed, the rule laid

³⁹⁹ *State v. Roberts*, 63 Vt. 139, 21 Atl. 424.

⁴⁰⁰ *Maxwell v. State*, 129 Ala. 48, 29 So. 981.

⁴⁰¹ *Myers v. State*, 37 Tex. Cr. App. 331, 39 S. W. 938.

⁴⁰² *Naugher v. State*, 116 Ala. 463, 23 So. 26.

⁴⁰³ *State v. Chaffin*, 56 S. Car. 431, 33 S. E. 454.

⁴⁰⁴ *Jimmerson v. State*, 133 Ala. 18, 32 So. 141; *Rush v. State*, (Tex. Cr. App.) 76 S. W. 927; *Johnson v. State*, 22 Tex. App. 206, 2 S. W. 609.

⁴⁰⁵ *Hinch v. State*, 25 Ga. 699.

⁴⁰⁶ See, *State v. Phillips*, 119 Iowa 652, 94 N. W. 229, 67 L. R. A. 292, and extended note on the general subject; also elaborate note in, 67 L. R. A. 529, et seq.

⁴⁰⁷ It has been held that, when the homicide is committed in defense of another, any evidence is competent to establish justification that would have been competent if the act had been committed in defense of the defendant's own person. *People v. Curtis*, 52 Mich. 616, 18 N. W. 385; see also, *State v. Felker*, 27 Mont. 451, 71 Pac. 668;

down in some of the older cases in regard to the absolute necessity of the act and the subject of "retreating to wall" as against a murderous assault, where to do so would apparently endanger life or limb and be unreasonable, no longer prevails, if it ever did obtain, in most jurisdictions.⁴⁰⁸ It is said in one case that "self-defense, or killing another in defense of one's own person, is mostly where one is suddenly assailed by another without fault on his part, and under such circumstances as to give him just and reasonable ground to believe that he is in danger of losing his life or suffering some great bodily harm, enormous bodily harm. In such case the assailed need not wait for the apprehended injury by his adversary, but may take his life if necessary to protect his own person."⁴⁰⁹ It is not absolutely essential that the danger apprehended should be actual, positive and imminent so as to make the homicide absolutely necessary. If it is apparent and the defendant had reasonable apprehension and ground

Wood v. State, 128 Ala. 27, 29 So. 557; State v. Austin, 104 La. 409, 29 So. 23; State v. Foster, (Tenn.) 49 S. W. 747; see generally note in, 74 Am. St. 735, 737-740.

⁴⁰⁸ See, La Rue v. State, 64 Ark. 144, 40 S. W. 466; People v. Lewis, 117 Cal. 186, 48 Pac. 1088, 59 Am. St. 167, and note; Runyan v. State, 57 Ind. 80; Miller v. State, 74 Ind. 1; Page v. State, 141 Ind. 236, 40 N. E. 745; State v. Hatch, 57 Kans. 420, 46 Pac. 708, 57 Am. St. 337; McClurg v. Commonwealth, (Ky.) 36 S. W. 14; Wilson v. Commonwealth, (Ky.) 63 S. W. 738; Bohannon v. Commonwealth, 8 Bush (Ky.) 482, 8 Am. Dec. 474; State v. Robertson, 50 La. Ann. 92, 23 So. 9, 69 Am. St. 393; McCall v. State, (Miss.) 29 So. 1003; State v. Hudspeth, 150 Mo. 12, 51 S. W. 483; State v. Bartlett, 170 Mo. 658, 71 S. W. 148; State v. Rolla, 21 Mont. 582, 55 Pac. 523; State v. Kennedy, 7 Nev. 374; Erwin v. State, 29 Ohio St. 186, 23 Am. R. 733; Kirk v. Territory, 10 Okla. 46, 60 Pac. 797; State v. Sherman, 16 R. I. 631; State v. Carter, 15 Wash. 121, 45 Pac. 745; State v.

Clark, 51 W. Va. 457, 41 S. E. 204; see also, High v. State, 26 Tex. App. 454, 8 Am. St. 488; but compare, Elland v. State, 52 Ala. 322; Brown v. State, 83 Ala. 33, 3 Am. St. 685; State v. Warren, 1 Marv. (Del.) 487, 41 Atl. 190; Snelling v. State, (Fla.) 37 So. 917; State v. Benham, 23 Iowa 154, 92 Am. Dec. 417; State v. Warner, 100 Iowa 260, 69 N. W. 546; Shorter v. People, 2 N. Y. 193, 5 Am. Dec. 286; People v. Johnson, 139 N. Y. 358, 34 N. E. 920; People v. Constantino, 153 N. Y. 24, 47 N. E. 37; State v. Kennedy, 91 N. Car. 572; Commonwealth v. Breyessee, 160 Pa. St. 451, 28 Atl. 646, 40 Am. St. 729; State v. Sumner, 55 S. Car. 32, 74 Am. St. 707; State v. Roberts, 63 Vt. 139, 21 Atl. 424; Allen v. United States, 164 U. S. 492, 17 Sup. Ct. 154; but see, Alberty v. United States, 162 U. S. 499, 16 Sup. Ct. 864; Beard v. United States, 158 U. S. 550, 15 Sup. Ct. 962; see notes in, 28 Am. St. 944, 953; 42 Am. St. 322; 48 Am. St. 22; 6 L. R. A. 424; 74 Am. St. 726.

⁴⁰⁹ State v. Walker, 9 Houst. (Del.) 464, 33 Atl. 227.

for the same and for so acting it will generally be sufficient to justify or at least excuse him.⁴¹⁰ "In other words, he is justified in acting upon the facts as they appear to him at the time, and is not to be judged by the facts as they actually are or as they appear to the jury."⁴¹¹ But, as a general rule, only such force should be used as is reasonably necessary, or as appears to be reasonably necessary, and when the force of the aggressor is repelled and protection achieved, the repellant force should cease and not be continued until it becomes unnecessarily aggressive.⁴¹² The question of the apparent danger

⁴¹⁰ Many of the authorities to this effect are cited and reviewed in the note in, 74 Am. St. 717, et seq. And we cite only a few of the leading or more recent cases. *Smith v. State*, 59 Ark. 132, 26 S. W. 712, 43 Am. St. 20; *Hubbard v. State*, 37 Fla. 156, 20 So. 235; *Pinder v. State*, 27 Fla. 370, 8 So. 837, 26 Am. St. 75; *Enlow v. State*, 154 Ind. 664, 57 N. E. 539; *Campbell v. People*, 16 Ill. 17, 61 Am. Dec. 49; *Cockrill v. Commonwealth*, 95 Ky. 22, 23 S. W. 659; *McCrary v. State*, (Miss.) 25 So. 671; *State v. Hough*, (N. Car.) 50 S. E. 709; *Lagne v. Commonwealth*, 38 Pa. St. 265, 80 Am. Dec. 481; *Norris v. State*, (Tex. Cr. App.) 61 S. W. 493; *Brown v. Commonwealth*, 86 Va. 466, 10 S. E. 745; *Schmidt v. State*, (Wis.) 102 N. W. 1071; see also, 6 L. R. A. 424, note; 66 L. R. A. 367, note; 67 L. R. A. 304, note. As to application of this rule in case of resisting an officer who abuses his authority and uses unnecessary force, see note in, 66 L. R. A. 366-370, 375, et seq.

⁴¹¹ 25 Am. & Eng. Ency. of Law (2nd ed.) 260, 261; see also, *Swain v. State*, (Tex. Civ. App.) 86 S. W. 35; *State v. Reed*, 53 Kans. 767, 37 Pac. 174, 42 Am. St. 322; *People v. Lennon*, 71 Mich. 298, 38 N. W. 871, 15 Am. St. 259; *Smith v. State*, 59 Ark. 132, 26 S. W. 712, 43 Am. St.

20; *Watkins v. United States*, 1 Ind. Ter. 364, 41 S. W. 1044.

⁴¹² See, generally, *Noles v. State*, 26 Ala. 31, 62 Am. Dec. 711; *Askew v. State*, 94 Ala. 4, 10 So. 657, 33 Am. St. 83; *People v. Griner*, 124 Cal. 19, 56 Pac. 625; *Ray v. State*, 15 Ga. 223; *Davis v. People*, 88 Ill. 350; *Smith v. State*, 142 Ind. 288, 41 N. E. 595; *State v. Thompson*, 9 Iowa 188, 74 Am. Dec. 342; *Amos v. Commonwealth*, (Ky.) 28 S. W. 152; *Ruloff v. People*, 45 N. Y. 213; *Shorter v. State*, 2 N. Y. 193, 51 Am. Dec. 286; *State v. Harper*, 149 Mo. 514, 51 S. W. 89; *State v. Stockton*, 61 Mo. 382; *Blake v. State*, 3 Tex. App. 581; *Byrd v. Commonwealth*, 89 Va. 536, 16 S. E. 727; *State v. Zeigler*, 40 W. Va. 593, 21 S. E. 763; note in, 74 Am. St. 731, et seq. As it is not within the scope of this work to treat the substantive law of homicide further than may be proper or necessary in order to understand the rules of evidence and their application in such cases, no attempt has been made to fully treat the subject of self-defense or other defenses of justification or excuse, but a general view of some of the leading features of the subject is presented in this section, and the authorities cited with the annotations referred to will furnish a fairly comprehensive view of the subject.

favor of the accused, or to divert their minds from the question which they are to decide, or which can have no reasonable hearing upon that question, is not competent.⁴²⁸ Circumstantial as well as direct evidence is competent, and when direct evidence is wanting the offense may be sufficiently established by such evidence. Circumstantial evidence is often allowed to take a wide range, although it has been said that it should always be received and weighed with great caution.⁴²⁹ Evidence which shows or tends to show that the defendant was possessed of or procured the means of committing the homicide, that he had made arrangements therefor, or that he had the opportunity to commit the homicide, is competent⁴³⁰ in a proper case. Evidence that the defendant borrowed, purchased or stole, had in his possession or practiced using a similar weapon, has also been held admissible for the purpose of showing preparations to commit the crime.⁴³¹ In order to warrant a conviction on circumstantial

⁴²⁸ *Andersen v. United States*, 170 U. S. 481, 18 Sup. Ct. 689; *Compton v. State*, 117 Ala. 56, 23 So. 750; *Evans v. State*, 58 Ark. 47, 22 S. W. 1026; *People v. Dice*, 120 Cal. 189, 52 Pac. 477; *Taylor v. People*, 21 Colo. 426, 42 Pac. 652; *Roten v. State*, 31 Fla. 514, 12 So. 910; *Hood v. State*, 93 Ga. 168, 18 S. E. 553; *Kirkham v. People*, 170 Ill. 9, 48 N. E. 465; *Shields v. State*, 149 Ind. 395, 49 N. E. 351; *Riggs v. Commonwealth*, 103 Ky. 610, 45 S. W. 866; *State v. Johnson*, 41 La. Ann. 574, 7 So. 670; *People v. Macard*, 73 Mich. 15, 40 N. W. 784; *State v. Hudspeth*, 150 Mo. 12, 51 S. W. 483; *State v. Gay*, 18 Mont. 51, 44 Pac. 411; *Carr v. State*, 23 Neb. 749, 37 N. W. 630; *People v. Greenwall*, 108 N. Y. 296, 15 N. E. 404, 2 Am. St. 415; *State v. Symes*, 20 Wash. 484, 55 Pac. 626; *Holtz v. State*, 76 Wis. 99, 44 N. W. 1107.

⁴²⁹ *Campbell v. People*, 159 Ill. 9, 42 N. E. 123, 50 Am. St. 134; *Jenkins v. State*, 35 Fla. 737, 18 So. 182, 48 Am. St. 267; *Wharton v. State*, 73 Ala. 366; *Green v. State*, 38 Ark. 304; *People v. Smith*, 106 Cal. 73, 39 Pac. 40.

⁴³⁰ *Davis v. State*, 126 Ala. 44, 28 So. 617; *Bolling v. State*, 54 Ark. 588, 16 S. W. 658; *People v. Winters*, 125 Cal. 325, 51 Pac. 1067; *Burgess v. State*, 93 Ga. 304, 20 S. E. 331; *Palmer v. People*, 138 Ill. 356, 28 N. E. 130, 32 Am. St. 146; *Wood v. State*, 92 Ind. 269; *State v. Cunningham*, 111 Iowa 233, 82 N. W. 775; *State v. Brown*, 75 Me. 456; *Garlitz v. State*, 71 Md. 293, 18 Atl. 39; *State v. Barrett*, 40 Minn. 65, 41 N. W. 459; *State v. Rider*, 95 Mo. 474, 8 S. W. 723; *People v. Kennedy*, 159 N. Y. 346, 54 N. E. 51, 70 Am. St. 557; *State v. Brabham*, 108 N. Car. 793, 13 S. E. 217; *State v. O'Neill*, 13 Ore. 183, 9 Pac. 284; *State v. Mowry*, 21 R. I. 376, 43 Atl. 871; *State v. Doherty*, 72 Vt. 381, 48 Atl. 658; *Nicholas v. Commonwealth*, 91 Va. 741, 21 S. E. 364; *State v. McCann*, 16 Wash. 249, 47 Pac. 443.

⁴³¹ *Finch v. State*, 81 Ala. 41, 1 So. 565; *People v. Rogers*, 71 Cal. 565, 12 Pac. 679; *Walsh v. People*, 88 N. Y. 458; *Bolling v. State*, 54 Ark. 588, 16 S. W. 658.

evidence, however, it has been said in substance, that each necessary link, or in other words, each and every material and necessary fact upon which the conviction depends, must generally be proved by competent evidence, beyond all reasonable doubt; such facts must be consistent with each other and with the main fact sought to be proved; and the circumstances, taken together, must be of a conclusive nature, leading, on the whole, to a satisfactory conclusion and producing in effect a reasonable and moral certainty that the accused, and no other person, committed the offense charged.⁴³² The subject of the admissibility of evidence of other offenses generally has been treated in the first chapter in this volume. It is also treated, in connection with particular crimes, such as forgery, burglary, false pretenses and larceny. It is therefore unnecessary to consider it at length in this connection. Here, as elsewhere, the general rule is that evidence of a distinct independent offense is not competent to prove the defendant's guilt of the offense charged, but that evidence of other offenses is often competent to prove motive, intent and the like, or as part of the *res gestae*, when connected with the crime in question, and, if otherwise competent, it is not inadmissible merely because it tends to prove some other offense as well.⁴³³

§ 3044. Evidence in general—Admissible.—Photographs with proper evidence in relation thereto are admissible for the purpose of identifying the deceased.⁴³⁴ Photographs are also admissible for the purpose of showing the wounds on the body of the deceased.⁴³⁵

⁴³² 21 Am. & Eng. Ency. of Law, 213; see also, *Wharton v. State*, 73 Ala. 366; *Green v. State*, 38 Ark. 304; *People v. Smith*, 106 Cal. 73, 39 Pac. 40; *Jenkins v. State*, 35 Fla. 737, 18 So. 182, 48 Am. St. 267; *Campbell v. People*, 159 Ill. 9, 42 N. E. 123, 50 Am. St. 134; *Hinshaw v. State*, 147 Ind. 334, 47 N. E. 157; *State v. Kennedy*, 77 Iowa 208, 41 N. W. 609; *Jackson v. Commonwealth*, 100 Ky. 239, 38 S. W. 422, 66 Am. St. 336; *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; *People v. Aiken*, 66 Mich. 460, 33 N. W. 821, 11 Am. St. 512; *Perkins v. State*, (Miss.) 23 So. 579; *People v. Place*, 157 N. Y. 584, 52 N.

E. 576; *State v. Messimer*, 75 N. Car. 385; *Commonwealth v. Johnson*, 162 Pa. St. 63, 29 Atl. 280; *Lancaster v. State*, 91 Tenn. 267, 18 S. E. 777; *Hill v. State*, 37 Tex. Cr. App. 415, 35 S. W. 660; *State v. Smith*, 9 Wash. 341, 37 Pac. 491; *State v. Flanagan*, 26 W. Va. 116.

⁴³³ See, 62 L. R. A. 193, 201, 227, 278, 320, note, where numerous cases are collected and reviewed.

⁴³⁴ *State v. Windahl*, 95 Iowa 470, 64 N. W. 420; *Beavers v. State*, 58 Ind. 530.

⁴³⁵ *Malachi v. State*, 89 Ala. 134, 8 So. 104; *People v. Fish*, 125 N. Y. 136, 26 N. E. 319; *Wilson v. United States*, 162 U. S. 613, 16 Sup. Ct. 895.

So maps and diagrams properly authenticated and made by one having the requisite skill are admissible.⁴³⁶ Articles found on a dead body are proper to be considered in establishing its identity.⁴³⁷ And the identity of a human skull and jaw bone may be proved by persons who were familiar with the formation of the teeth and jaws of the person whose skull it is alleged to be.⁴³⁸ It has also been held that it is unnecessary, but is harmless to the accused, to prove that deceased was a human being.⁴³⁹ The character of foot-prints leading to or from the scene of the crime, discovered when the crime was discovered, and their correspondence with the feet of the accused, or with shoes worn by him or found in his possession, are admissible in evidence for the purpose of identifying him as the guilty agent.⁴⁴⁰ So, evidence as to the caliber of the bullet taken from the body of the person killed, and as to cartridges taken from defendant's trunk, has been held competent, as tending to identify the defendant as the person who shot the deceased.⁴⁴¹ Letters may be competent evidence when disclosing a motive.⁴⁴² They are also competent in a proper case when they contain a threat to kill the deceased or contain an admission that the defendant has committed the crime.⁴⁴³ So, letters are admissible to show the relations and feelings existing between the accused and the deceased.⁴⁴⁴ But letters written by the accused to his wife have been held not admissible against him.⁴⁴⁵ As a general rule, it is said that any competent evidence referring to the death and the criminal agency producing it

⁴³⁶ *Burton v. State*, 107 Ala. 108, 18 So. 284; *People v. Phelan*, 123 Cal. 551, 56 Pac. 424; *Territory v. Egan*, 3 Dak. 119, 13 N. W. 568; *Commonwealth v. Hourigan*, 89 Ky. 305, 12 S. W. 550; *Gavigan v. State*, 55 Miss. 533; *People v. Johnson*, 140 N. Y. 350, 35 N. E. 604; *Smith v. State*, 20 Tex. App. 134.

⁴³⁷ *State v. Dickson*, 78 Mo. 438.

⁴³⁸ *Gray v. Commonwealth*, 101 Pa. St. 380, 47 Am. R. 733.

⁴³⁹ *Epps v. State*, 102 Ind. 539, 1 N. E. 491.

⁴⁴⁰ *Young v. State*, 68 Ala. 569; *Campbell v. State*, 23 Ala. 44; *People v. McCurdy*, 68 Cal. 576, 10 Pac. 207; *Dillin v. People*, 8 Mich. 357; *Murphy v. People*, 63 N. Y. 590;

Stokes v. State, 5 Baxt. (Tenn.) 619, 30 Am. R. 72; *Walker v. State*, 7 Tex. App. 245, 32 Am. R. 595.

⁴⁴¹ *People v. Minisci*, 12 N. Y. St. 719.

⁴⁴² *Simons v. People*, 150 Ill. 66, 36 N. E. 1019.

⁴⁴³ *Singleton v. State*, 71 Miss. 782, 16 So. 295, 42 Am. St. 488; *State v. Soper*, 148 Mo. 217, 49 S. W. 1007.

⁴⁴⁴ *Commonwealth v. Krause*, 193 Pa. St. 306, 44 Atl. 454; *State v. Leabo*, 84 Mo. 168, 54 Am. R. 91; *Pettit v. State*, 135 Ind. 393, 34 N. E. 1118; *O'Brien v. Commonwealth*, 89 Ky. 354, 12 S. W. 471.

⁴⁴⁵ *Wilkerson v. State*, 91 Ga. 729, 17 S. E. 990, 44 Am. St. 63.

and which tends to establish or disprove them is admissible, and all proper facts in the case, however trivial, should be considered as bearing on the question of malice.⁴⁴⁶ So, where one person is killed by mistake for another, evidence showing malice on the part of defendant toward the person for whom deceased is supposed to have been mistaken is admissible.⁴⁴⁷ It has also been held that one indicted for murder may show that another had a motive for committing the murder.⁴⁴⁸ It has been held that where the accused entered a room with a drawn pistol, he may be examined as to what his intention was at the time he entered the room.⁴⁴⁹ But, in another case, where the charge was for assault with intent to murder, it was held that the accused could not be asked what his intent was.⁴⁵⁰ The fact that the prisoner secreted a knife, and began a fight with his fists, in the course of which he used the knife, has been held evidence of murderous intent.⁴⁵¹ Where a watchman shot a man, evidence that there had been much stealing in the neighborhood recently, was held competent on the question of intent.⁴⁵² It may be shown in a proper case, that the defendant and the deceased were on unfriendly terms.⁴⁵³ And evidence of a quarrel between defendant and deceased three or four weeks before the homicide has been held admissible as showing the relations between the parties.⁴⁵⁴ Evidence showing that deceased was the mistress of the accused has been held competent;⁴⁵⁵ and it has been held that the prosecution may prove that the deceased, when killed, was under the influence of whiskey.⁴⁵⁶ The fact of the possession of money by the accused is admissible⁴⁵⁷ in a proper

⁴⁴⁶ *United States v. Meagher*, 37 Fed. 875.

⁴⁴⁷ *Clarke v. State*, 78 Ala. 474, 56 Am. R. 45.

⁴⁴⁸ *Sawyers v. State*, 15 Lea (Tenn.) 694.

⁴⁴⁹ *State v. Wright*, 40 La. Ann. 589, 4 So. 486.

⁴⁵⁰ *Fonville v. State*, 91 Ala. 39, 8 So. 688.

⁴⁵¹ *Price v. State*, 36 Miss. 531, 72 Am. Dec. 195.

⁴⁵² *Hobbs v. State*, 16 Tex. App. 517.

⁴⁵³ *State v. Stackhouse*, 24 Kans. 445; see also, *Siberry v. State*, 133 Ind. 677, 33 N. E. 681; *Siberry v. State*, 149 Ind. 684, 39 N. E. 936.

⁴⁴⁴ *People v. Lyons*, 110 N. Y. 618, 17 N. E. 391; see also, *Davidson v. State*, 135 Ind. 254, 34 N. E. 972; *Cluck v. State*, 40 Ind. 263.

⁴⁴⁵ *People v. Young*, 102 Cal. 411, 36 Pac. 770.

⁴⁴⁶ *Holmes v. State*, 11 Tex. App. 223; *State v. Horne*, 9 Kans. 119; *State v. Barfield*, 30 N. Car. 344.

⁴⁴⁷ *Commonwealth v. Williams*, 171 Mass. 461, 50 N. E. 1035; *Little v. State*, 39 Tex. Cr. App. 654, 47 S. W. 984; *People v. Johnson*, 140 N. Y. 350, 35 N. E. 604; *Gates v. People*, 14 Ill. 433; *State v. Magers*, 36 Ore. 38, 58 Pac. 892.

case. Thus the fact that the accused after the homicide had in his possession a sum of money corresponding to an amount that was shown to have been possessed by the deceased, taken in connection with the evidence of the previous impecunious condition of the accused, was held competent.⁴⁵⁸ Sayings of the assailant next day after the assault, showing bitter hatred toward the person assailed, are admissible to show malice at the time of the assault.⁴⁵⁹ So evidence is competent in a proper case to show that the accused had in his possession a weapon which might have caused the wounds on the body of the deceased.⁴⁶⁰ And it has been held not improper to show the business of the accused at the time of the killing.⁴⁶¹ Where the theory of the state was that defendant had given deceased whiskey containing a poison, to produce an abortion, which had caused her death, it was held that a witness should have been allowed to testify that a few days before the death of deceased he heard her say that she was pregnant, and that she asked him to procure an abortifacient for her, suggesting ergot; that he had refused to do so, but that, on her request, her brother-in-law had taken some money from her, and agreed to get it for her.⁴⁶² An expert who has heard the autopsy described may be asked if, in his opinion, it was properly conducted.⁴⁶³ It is also held that a competent surgeon or medical practitioner, who conducted an autopsy, may testify as to the result of it.⁴⁶⁴ So it is held that the physician may describe what tests are necessary to ascertain the cause of death, and after relating the facts revealed by the autopsy, may give his opinion, based thereon, as to the cause and mode of death.⁴⁶⁵ It is proper to admit evidence concerning a supposed spot of blood on defendant's coat, together with a test of physicians with reference thereto.⁴⁶⁶ And in a recent text book it is said: "All persons are more or less familiar with the appearance of stains caused by blood. It has, therefore, been repeatedly held from time immemorial that ordinary witnesses may testify that certain

⁴⁵⁸ *Gates v. People*, 14 Ill. 433;
Garza v. State, 39 Tex. Cr. App. 358,
 46 S. W. 242, 73 Am. St. 927.

⁴⁵⁹ *Meeks v. State*, 51 Ga. 429.

⁴⁶⁰ *People v. McDowell*, 64 Cal. 467,
 3 Pac. 124.

⁴⁶¹ *Fahnestock v. State*, 23 Ind.
 231; *State v. Moelchen*, 53 Iowa 310,
 5 N. W. 186; *O'Brien v. Common-*
wealth, 89 Ky. 354, 12 S. W. 471.

⁴⁶² *Brown v. Commonwealth*, 26
 Ky. L. R. 1269, 83 S. W. 645.

⁴⁶³ *State v. Moxley*, 102 Mo. 374, 15
 S. W. 556.

⁴⁶⁴ *Commonwealth v. Taylor*, 132
 Mass. 261.

⁴⁶⁵ *State v. Merriman*, 34 S. Car. 16,
 12 S. E. 619.

⁴⁶⁶ *Beavers v. State*, 58 Ind. 530.

stains on clothing or other articles look like or resemble blood stains. No peculiar skill or experience is required to be possessed by a witness who saw the stains in court or elsewhere to render his evidence admissible, nor need a chemical analysis, or test, or a microscopical examination have been made."⁴⁶⁷ Where it appears that deceased was shot, and there is evidence that defendant, when arrested, said he could not shoot a rifle, or had not shot a gun for a long time, it is proper to admit evidence that he is an expert with the rifle.⁴⁶⁸ So, in rebuttal of testimony for the defendant that, as the deceased fell, he threw a pistol over into the field, witnesses may testify that the morning after the killing they went into such field and found no pistol.⁴⁶⁹

§ 3045. Evidence in general—Not admissible.—As already shown, threats against "some one" or the like may be admissible when it appears that the deceased was meant, but threats made by the accused prior to the murder, to kill or injure a person other than the deceased, are not ordinarily admissible.⁴⁷⁰ Evidence was admitted by the trial court in one case that, on the day before the killing the deceased and the defendant had played at dice, and the deceased had won the defendant's watch, which was missing from his body when found, and it was held on appeal that questions as to whether persons other than defendant had gambled with deceased, and questions to a female witness as to whether her husband had not on one occasion shot at deceased, and whether she and her husband were living apart from each other on account of her relations with deceased, were not admissible.⁴⁷¹ The opinion of a witness that a person killing another in a fight had an intent to kill the deceased before the fight commenced is not competent evidence of such intent.⁴⁷² And a witness cannot be asked whether defendant's pistol was fired accidentally or purposely.⁴⁷³ Evidence that the deceased was intoxicated is irrelevant when offered without any evidence of

⁴⁶⁷ Underhill Cr. Ev., § 334; see also, *People v. Gonzalez*, 35 N. Y. 49; *State v. Bradley*, 67 Vt. 465, 32 Atl. 228; *State v. Welch*, 36 W. Va. 690, 15 S. E. 419; *Thomas v. State*, 67 Ga. 460; *McLain v. Commonwealth*, 99 Pa. St. 86, 100; *People v. Smith*, 112 Cal. 333, 44 Pac. 663.

⁴⁶⁸ *People v. Evans*, (Cal.) 41 Pac. 444.

⁴⁶⁹ *Gregory v. State*, 140 Ala. 16, 37 So. 259.

⁴⁷⁰ *Carr v. State*, 23 Neb. 749, 37 N. W. 630.

⁴⁷¹ *Bowen v. State*, 140 Ala. 65, 37 So. 233.

⁴⁷² *Fundy v. State*, 30 Ga. 400.

⁴⁷³ *State v. Ross*, 32 La. Ann. 854.

necessity for defendant to kill him, and when all the evidence introduced shows that the defendant was the aggressor.⁴⁷⁴ And even if intoxication of the deceased may be considered on the question of self-defense or necessity for the defendant to take the former's life, evidence that deceased had a jug of whiskey at home, or carried one home the day of the homicide, is irrelevant, and does not tend to show he was intoxicated at the time of the trouble. It is also held in the same case that the defendant should not be allowed to testify why he had the pistol on the occasion of the difficulty. Hearsay evidence not falling within any of the exceptions, limitations or qualifications of the hearsay rule, is incompetent;⁴⁷⁵ and dying declarations have been held inadmissible to prove prior difficulties or threats.⁴⁷⁶

§ 3046. Weight and sufficiency—Variance.—Proof of a killing, in any manner or by any means, that correspond substantially with the indictment, is sufficient.⁴⁷⁷ Thus, proof of a shooting with a pistol has been held sufficient to sustain an averment of shooting with a gun and vice versa.⁴⁷⁸ And proof of killing with a dagger or bowie-knife will sustain an averment of death from stabbing with a dirk, sword or similar weapon.⁴⁷⁹ But proof of killing with a knife is not sufficient to sustain an allegation of killing by shooting and, as a rule, where the killing is charged to have been with a certain weapon, proof of an entirely different kind of a weapon is held a fatal variance.⁴⁸⁰ Difference in the spelling of the name will be disregarded when the name as proved is idem sonans with that alleged.⁴⁸¹ Circumstantial evidence of the identity of deceased, which leaves no room for reasonable doubt, is sufficient.⁴⁸² And circumstantial evi-

⁴⁷⁴ Gregory v. State, 140 Ala. 16, 37 So. 259.

⁴⁷⁵ Forman v. Commonwealth, 9 Ky. L. R. 759, 6 S. W. 579; State v. Terrell, 12 Rich. L. (S. Car.) 321; Brown v. People, 17 Mich. 429; Stephens v. State, 20 Tex. App. 255.

⁴⁷⁶ Binns v. State, 46 Ind. 311; Jones v. State, 71 Ind. 66; State v. Wood, 53 Vt. 560; State v. Moody, 18 Wash. 165, 51 Pac. 356; Sullivan v. State, 102 Ala. 135, 15 So. 264, 48 Am. St. 22; ante, Vol. I, § 336.

⁴⁷⁷ Commonwealth v. Webster, 5 Cush. (Mass.) 295; State v. Smith, 32 Me. 369; see also, Andersen v.

United States, 170 U. S. 481, 18 Sup. Ct. 689; Terry v. State, 120 Ala. 286, 25 So. 176.

⁴⁷⁸ Commonwealth v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; State v. Lautenschlager, 22 Minn. 514; Turner v. State, 97 Ala. 57, 12 So. 54.

⁴⁷⁹ Hernandez v. State, 32 Tex. Cr. App. 271, 22 S. W. 972.

⁴⁸⁰ Witt v. State, 6 Cold. (Tenn.) 5.

⁴⁸¹ State v. Lincoln, 17 Wis. 597; Grous v. State, 29 Ind. 93; State v. Witt, 34 Kans. 488, 8 Pac. 769.

⁴⁸² State v. Dickson, 78 Mo. 438.

dence may be sufficient even as to the corpus delicti.⁴⁸³ Convictions have been upheld when only charred or mutilated parts of the body have been found, the deceased, having been burned, cut in pieces, or subjected to the action of acid.⁴⁸⁴ And the fact of death may be proved by circumstantial evidence, when that is the best evidence obtainable.⁴⁸⁵ So proof of premeditation need not be direct and positive, but may be deduced from all the facts attending the killing.⁴⁸⁶ But it has been held that where it is probable that the death may have been due to natural causes or to accident, a conviction of murder in the second degree even cannot stand.⁴⁸⁷ And it has also been held that if it appears that the instrument used would not probably cause death, the jury should be limited to finding no greater degree of crime than manslaughter.⁴⁸⁸ To warrant a conviction of murder in the first degree it has been said that express malice must be proved by such evidence as is reasonably sufficient to satisfy the jury of its existence.⁴⁸⁹ But it has been held that conviction of a defendant of murder in the first degree was warranted by evidence showing the death of deceased by a pistol shot, the presence of defendant at or about the time of the shooting, his previous threats, immediate flight, and subsequent arrest in a neighboring state.⁴⁹⁰ And it has been held that where, after a violent attack, death soon ensued, the jury were justified in finding an intent on the part of the assailant to kill.⁴⁹¹ And where, on a conviction for murder, the evidence warrants the jury in believing that defendant killed deceased intentionally, and

⁴⁸³ As to evidence of the corpus delicti held sufficient, see, *People v. Moran*, 144 Cal. 48, 77 Pac. 777; *Wilson v. State*, 140 Ala. 43, 37 So. 93; *Edwards v. Territory*, (Ariz.) 76 Pac. 458; as to identity of accused, see, *People v. Buckley*, 143 Cal. 375, 77 Pac. 169; *Commonwealth v. Salyards*, 158 Pa. St. 501, 27 Atl. 993.

⁴⁸⁴ *Stocking v. State*, 7 Ind. 326; *Commonwealth v. Williams*, 171 Mass. 461, 50 N. E. 1035; *People v. Alviso*, 55 Cal. 230; *Anderson v. State*, 24 Fla. 139, 3 So. 884; *Lancaster v. State*, 91 Tenn. 267, 18 S. W. 777; *State v. Smith*, 9 Wash. 341, 37 Pac. 491.

⁴⁸⁵ *Campbell v. People*, 159 Ill. 9, 42 N. E. 123.

⁴⁸⁶ *Yates v. State*, 26 Fla. 484, 7 So. 880; *State v. Mitchell*, 64 Mo. 191; *Territory v. Romine*, 2 N. M. 114; see also, *State v. Lipscomb*, 134 N. Car. 689, 47 S. E. 44.

⁴⁸⁷ *Lucas v. State*, 19 Tex. App. 79.

⁴⁸⁸ *State v. Craton*, 28 N. Car. 164.

⁴⁸⁹ *Farrer v. State*, 42 Tex. 265.

⁴⁹⁰ *Commonwealth v. Salyards*, 158 Pa. St. 501, 27 Atl. 993; see also for other cases of evidence held sufficient to sustain a conviction of murder in the first degree, *Spaulding v. State*, 162 Ind. 297, 70 N. E. 243; *People v. Mooney*, 178 N. Y. 91, 70 N. E. 97; *Black v. State*, (Tex. Cr. App.) 81 S. W. 302; *State v. Clark*, 34 Wash. 485, 76 Pac. 98.

⁴⁹¹ *Luck v. State*, 96 Ind. 16.

in cold blood, the absence of satisfactory proof of motive is not material.⁴⁹² In case of homicide by poisoning it is held that a chemical analysis, an autopsy, and the aid of expert testimony, though very desirable, are never indispensable.⁴⁹³ It has also been held that if it is shown that poison was in a house where the accused lived, within easy reach, and that he had knowledge of the fact, a conviction will be sustained⁴⁹⁴ on that and other proper evidence. Proof of venue has been held sufficient if it is proved in any manner which satisfies the jury that the killing was committed within the jurisdiction of the court.⁴⁹⁵

⁴⁹² *People v. Sliney*, 137 N. Y. 570, 33 N. E. 150; *Lillie v. State*, (Neb.) 100 N. W. 316; see also, § 3026, on motive.

⁴⁹³ *Johnson v. State*, 29 Tex. App. 150, 15 S. W. 647; *State v. Slagle*, 83 N. Car. 630. See also, *People v. Wood*, (Cal.) 79 Pac. 367.

⁴⁹⁴ *Zoldoske v. State*, 82 Wis. 580, 52 N. W. 778.

⁴⁹⁵ *State v. West*, 69 Mo. 401, 33 Am. R. 506; *Marion v. State*, 20 Neb. 233, 29 N. W. 911, 57 Am. R. 825; *Stringfellow v. State*, 26 Miss. 157, 59 Am. Dec. 247; *Dumas v. State*, 62 Ga. 58; *Beavers v. State*, 58 Ind. 530; *Commonwealth v. Kaiser*, 184 Pa. St. 493, 39 Atl. 299; *Riggs v. State*, 30 Miss. 635.

CHAPTER CXLVI.

LARCENY.

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§ 3047. **Definition and elements.**—Larceny is the wrongful taking and carrying away of the personal goods of another with the felonious intent to convert them to the taker's own use and make them his own property without the consent of the owner.¹ It is also stated in some definitions that the taking must be without any color or pretense of right. But this is generally understood to be included in the statement that it must be with felonious intent. In a valuable note upon the subject, in a recent report, it is said: "Larceny may, in general, be defined as the taking by trespass and carrying away of the personal property of another, without his consent, with the intent to deprive the owner thereof. Thus, larceny is (1) the taking (2) by trespass (3) and carrying away (4) of the personal property (5) of another (6) without his consent, (7) with the intent to de-

¹ 2 East P. C. 553; State v. South, 28 N. J. L. 28, 75 Am. Dec. 250; Ransom v. State, 22 Conn. 153, 156; Robinson v. State, 113 Ind. 510, 512, 16 N. E. 184; 2 Bouvier L. Dict. (Rawle's ed.) 134; see also, 4 L. R. A. 291, note; 2 Bishop Cr. Law, §§ 757, 758; and 57 Am. Dec. 271, note; in some of the states the offense is defined by statute and in a few of them some change is made, and acts are included which would not have constituted larceny at common law. Larceny without personal violence or aggravating circumstances is sometimes called simple larceny, and larceny accompanied by aggravating circumstances is sometimes called compound larceny. So, larceny is classified as grand larceny and as petit larceny, according to the value of the property.

prive the owner thereof.”² These different elements, and the evidence admissible and necessary to prove or disprove them, will be considered in the subsequent sections in this chapter, but an attempt will first be made to distinguish larceny from other somewhat similar offenses.

§ 3048. Distinguished from other crimes.—Larceny bears a close resemblance to some other offenses, and it is sometimes difficult to distinguish them. This is especially true in regard to embezzlement and false pretense, but the distinction is well shown in an opinion by the Supreme Court of Massachusetts as follows: “If a person honestly receives the possession of the goods, chattels, or money of another upon any trust, express or implied, and, after receiving them, fraudulently converts them to his own use, he may be guilty of embezzlement, but cannot be of that of larceny, except as embezzlement is by statute made larceny. If the possession of such property is obtained by fraud, and the owner of it intends to part with his title as well as his possession, the offense is that of obtaining property by false pretenses, provided the means by which they are acquired are such as in law are false pretenses. If the possession is fraudulently obtained, with intent on the part of the person obtaining it to convert the same to his own use, and the person parting with it intends to part with his possession merely, and not with his title to the property, the offense is larceny.”³

§ 3049. The taking.—The prosecution must show a taking of the property by the defendant,⁴ but this may, in some cases, be constructive as well as actual, and it is not absolutely necessary that the taking should be by the defendant with his own hands,⁵ nor that the

² 88 Am. St. 561, note.

³ Commonwealth v. Barry, 124 Mass. 325, approved and adopted in, People v. Miller, 169 N. Y. 339, 62 N. E. 418, 88 Am. St. 546; see also as to the distinction between larceny and false pretenses, Zink v. People, 77 N. Y. 114, 33 Am. R. 589; People v. Tomlinson, 102 Cal. 19, 36 Pac. 506; see as to distinction between larceny and robbery, Brennon v. State, 25 Ind. 403; State v. Hender-

son, 66 N. Car. 627; State v. Sommers, 12 Mo. App. 374.

⁴ Fulton v. State, 13 Ark. 168; Mizell v. State, 38 Fla. 20, 20 So. 769; Sharp v. State, 29 Tex. App. 211, 15 S. W. 176.

⁵ Lester v. State, 32 Ark. 727; Commonwealth v. Lucas, 2 Allen (Mass.) 170; Commonwealth v. Barry, 125 Mass. 390; State v. Stroud, 95 N. Car. 626; Commonwealth v. Cruikshank, 138 Pa. St. 194, 20 Atl.

property should actually come into his manual possession.⁶ In other words, "to constitute one a taker of property, it is not necessary that he should actually take it into his physical possession, or that he be personally present at the time and place of the actual taking. It is sufficient if at the time of the taking he is doing something to aid and assist the one who does the actual taking."⁷ So, he may take the property by means of an innocent third person.⁸ It has also been held that proof that employes feloniously removed and sold their employer's property is sufficient although it has been in their custody.⁹ The act of taking in larceny is usually done more or less in secret, but the mere fact that it was somewhat publicly done does not necessarily prevent the offense from being larceny.¹⁰ It is, however, a material circumstance tending to negative an intent to steal.¹¹

§ 3050. The trespass.—It is essential that, in some sense at least, a trespass should be shown to have been committed. Unless the ele-

937; *Pyland v. State*, 4 Sneed (Tenn.) 357; *Lane v. State*, 41 Tex. Cr. App. 558, 55 S. W. 831; *Rex v. Pitman*, 2 Car. & P. 423, 12 E. C. L. 653.

⁶ *Doss v. State*, 21 Tex. App. 505, 2 S. W. 814, 57 Am. R. 618; *State v. Hunt*, 45 Iowa 673; *Wixson v. People*, 5 Park. Cr. Cas. (N. Y.) 119; *People v. Gillis*, 6 Utah 84, 21 Pac. 404.

⁷ *Wright v. State*, 18 Tex. App. 358; *Gentry v. State*, 24 Tex. App. 478, 6 S. W. 321; *Willis v. State*, 24 Tex. App. 586, 6 S. W. 857; *Edmonds v. State*, 70 Ala. 8; *Kent v. State*, 64 Ark. 247, 41 S. W. 849.

⁸ *Doss v. State*, 21 Tex. App. 505, 2 S. W. 814, 57 Am. R. 618; *Lane v. State*, 41 Tex. Cr. App. 558, 55 S. W. 831; *Sanderson v. Commonwealth*, 11 Ky. L. R. 341, 12 S. W. 136; *Cummins v. Commonwealth*, 5 Ky. L. R. 200; see also, *State v. Hunt*, 45 Iowa 673.

⁹ *Atterberry v. State*, 56 Ark. 515, 20 S. W. 411; *People v. Call*, 1 Den. (N. Y.) 120, 43 Am. Dec. 655; *Reg.*

v. Hornby, 1 Car. & Kir. 305, 47 E. C. L. 304; *Marcus v. State*, 26 Ind. 101; but see, *State v. Wingo*, 89 Ind. 204; *Wynegar v. State*, 157 Ind. 577, 62 N. E. 38; see generally, 88 Am. St. 580, 581, note. Where a servant has the mere custody of the property, the possession remains in the master, or in other words, the servant's possession is that of the master.

¹⁰ *Talbert v. State*, 121 Ala. 33, 25 So. 690; *McMullen v. State*, 53 Ala. 531; *Newsom v. State*, 107 Ala. 133, 18 So. 206; *Higgs v. State*, 113 Ala. 36, 21 So. 353; *State v. Fenn*, 41 Conn. 590; *State v. Zumbunson*, 86 Mo. 111; *Johnson v. Commonwealth*, 24 Gratt. (Va.) 555; but see, *State v. Ledford*, 67 N. Car. 60.

¹¹ *Johnson v. State*, 73 Ala. 523; *Buchanan v. State*, (Miss.) 5 So. 617; *McDaniel v. State*, 8 Smed. & M. (Miss.) 401, 47 Am. Dec. 93; *Stuart v. People*, 73 Ill. 20; see also, *Causey v. State*, 79 Ga. 564, 5 S. E. 121, 11 Am. St. 447; *Seymore v. State*, 12 Tex. App. 391.

ment of trespass exists there can be no theft.¹² Thus, where the defendant had lawful possession, in the first instance, a refusal to deliver to the owner on demand was held insufficient to constitute larceny.¹³ So, generally, when the owner consents to part not merely with possession but with his entire ownership, there is no trespass, and, hence no larceny.¹⁴ And, "as a general rule, a bailment passes the possession of the property to the bailee, as distinct from the mere custody, and hence a bailee could not be guilty of larceny, since he came lawfully into the possession of the property and, therefore, failed to commit the trespass necessary to render the offense larceny. This was the rule of common law, and except where modified by statute so as to make bailees generally guilty of larceny, it is still the rule."¹⁵ But where the owner merely parts with the custody and the constructive possession remains in him the elements of trespass may be present and even the custodian may be guilty of larceny.¹⁶ So, as stated in another section, where one gets possession of personal

¹² *State v. Martin*, 12 Ired. L. (N. Car.) 157; *Gadson v. State*, 36 Tex. 350; *Garner v. State*, 36 Tex. 693; *State v. Copeland*, 86 N. Car. 691; *People v. McDonald*, 43 N. Y. 61; *State v. McCartey*, 17 Minn. 76; *Phelps v. People*, 72 N. Y. 334; *Hite v. State*, 9 Yerg. (Tenn.) 197; *Pritchett v. State*, 2 Sneed (Tenn.) 285, 62 Am. Dec. 468.

¹³ *People v. Taugher*, 102 Mich. 598, 61 N. W. 66.

¹⁴ See, *Haley v. State*, 49 Ark. 147, 4 S. W. 746; *Stewart v. People*, 173 Ill. 464, 50 N. E. 1056, 64 Am. St. 133; *State v. Reese*, 49 La. Ann. 1337, 22 So. 378; *Elliott v. Commonwealth*, 12 Bush (Ky.) 176.

¹⁵ 88 Am. St. 576, note; *Wright v. Lindsay*, 20 Ala. 428; *Case v. State*, 26 Ala. 17; *Spivey v. State*, 26 Ala. 90; *Johnson v. People*, 113 Ill. 99; *State v. Fairclough*, 29 Conn. 47, 76 Am. Dec. 590 (carrier); *Warmoth v. Commonwealth*, 81 Ky. 133; *Commonwealth v. Ryan*, 155 Mass. 523, 30 N. E. 364, 31 Am. St. 560; *Commonwealth v. King*, 9 Cush. (Mass.)

284; *Nichols v. People*, 17 N. Y. 114 (carrier); *People v. Cruger*, 102 N. Y. 510, 7 N. E. 555, 55 Am. R. 830; *State v. England*, 8 Jones L. (N. Car.) 399, 80 Am. Dec. 334; *Stokely v. State*, 24 Tex. App. 509, 6 S. W. 538; *Hill v. State*, 57 Wis. 377, 15 N. W. 445; *Krause v. Commonwealth*, 93 Pa. St. 418, 39 Am. R. 762; *People v. Call*, 1 Den. (N. Y.) 120, 43 Am. Dec. 655; *State v. Fairclough*, 29 Conn. 47, 76 Am. Dec. 590; *Robinson v. State*, 1 Coldw. (Tenn.) 120, 78 Am. Dec. 487; *Gill v. Bright*, 6 T. B. Mon. (Ky.) 130; *Richards v. Commonwealth*, 13 Gratt. (Va.) 803; *Holbrook v. State*, 107 Ala. 154, 18 So. 109, 54 Am. St. 65; but see, 57 Am. Dec. 280-283, note.

¹⁶ See, *People v. Call*, 1 Den. (N. Y.) 120, 43 Am. Dec. 655; *Holbrook v. State*, 107 Ala. 154, 18 So. 109, 54 Am. St. 65; *State v. McCartey*, 17 Minn. 76; *Brown v. People*, 20 Colo. 161, 36 Pac. 1040; *Commonwealth v. Flynn*, 167 Mass. 460, 45 N. E. 924, 57 Am. R. 472; 88 Am. St. 578, 580, note.

property by means of fraud or a trick, with a preconcerted design or felonious intent to steal the property, the taking may nevertheless be larceny, for the fraud vitiates the transaction, the owner is still deemed to retain a constructive possession of the property, and the conversion and taking of it by the defendant is deemed to constitute such a trespass to that possession as is essential to the crime of larceny.¹⁷ And the same theory of constructive possession in the owner and trespass thereto is deemed in most jurisdictions, with the other essential elements in such cases, to support the rule that there may be larceny where property has been mislaid or even lost.¹⁸

§ 3051. The carrying away.—The carrying away of the property is an element of the offense as essential as any other.¹⁹ But any removal of the property such as works a complete severance from the possession of the owner is generally sufficient.²⁰ Thus, a very slight removal,²¹ and a mere temporary possession of the property by the

¹⁷ See, § 3048; also, *Crum v. State*, 148 Ind. 401, 47 N. E. 833; *Huber v. State*, 57 Ind. 341, 26 Am. R. 57; *Fleming v. State*, 136 Ind. 149, 36 N. E. 154; *Grunson v. State*, 89 Ind. 533, 46 Am. R. 178; *Hecox v. State*, 105 Ga. 625, 31 S. E. 592; *People v. Rae*, 66 Cal. 423, 6 Pac. 1, 56 Am. R. 102; *People v. Montaral*, 120 Cal. 691, 53 Pac. 355; *People v. Tomlinson*, 102 Cal. 19, 36 Pac. 506. The subject is well explained in the first and last Indiana cases and the last California case above cited. See also, *Gillet Cr. Law*, § 540.

¹⁸ See, *Tanner v. Commonwealth*, 14 Gratt. (Va.) 635; *State v. Martin*, 28 Mo. 530; *Lamb v. State*, 40 Neb. 312, 58 N. W. 963; *Pritchett v. State*, 2 Sneed (Tenn.) 285, 62 Am. Dec. 468; *Pyland v. State*, 4 Sneed (Tenn.) 357; but compare, *Porter v. State*, Mart. & Yerg. (Tenn.) 226; also, *State v. England*, 8 Jones L. (N. Car.) 399, 80 Am. Dec. 334.

¹⁹ *Mizell v. State*, 38 Fla. 20, 20 So. 769; *Harrison v. People*, 50 N. Y. 518, 10 Am. R. 517; *Eckels v. State*, 20 Ohio St. 508; *Wright v. State*, 18

Tex. App. 358, 365; *Sharp v. State*, 29 Tex. App. 211, 213, 15 S. W. 176, 177; *State v. Wingo*, 89 Ind. 204, 207; *Starck v. State*, 63 Ind. 285; *State v. Craige*, 89 N. Car. 475, 45 Am. R. 698; *Commonwealth v. Luckis*, 99 Mass. 431, 96 Am. Dec. 769; *Gettinger v. State*, 13 Neb. 308, 14 N. W. 403; *State v. Wilson*, 1 N. J. L. 439, 1 Am. Dec. 216; *State v. Higgins*, 88 Mo. 354.

²⁰ *State v. Taylor*, 136 Mo. 66, 37 S. W. 907; *Edmonds v. State*, 70 Ala. 8, 9; *State v. Seagler*, 1 Rich. L. (S. Car.) 30; *State v. Gilbert*, 68 Vt. 188, 34 Atl. 697; *Gettinger v. State*, 13 Neb. 308, 14 N. W. 403.

²¹ *Gettinger v. State*, 13 Neb. 308, 14 N. W. 403; *State v. Green*, 81 N. Car. 560; *State v. Higgins*, 88 Mo. 354; *Eckels v. State*, 20 Ohio St. 508; *State v. Chambers*, 22 W. Va. 779, 46 Am. R. 550; but see, *Edmonds v. State*, 70 Ala. 8, 45 Am. R. 67; *Commonwealth v. Luckis*, 99 Mass. 431, 96 Am. Dec. 769; *State v. Jones*, 65 N. Car. 395; *People v. Meyer*, 75 Cal. 383, 17 Pac. 431.

thief²² may be sufficient. The authorities already cited in the notes will suffice as illustrations of what is or is not sufficient in this respect.²³

§ 3052. The property—Value—Identification.—As a general rule any personal property may be the subject of larceny.²⁴ But at common law choses in action were not,²⁵ and animals *ferae naturae* or those of a so-called base nature, including dogs, were held not to be the subject of larceny in most of the earlier cases,²⁶ but a more liberal rule now prevails in regard to dogs, especially where they are regarded as personal property and taxed as such.²⁷ Property annexed to the freehold or savoring of the realty is not the subject of larceny at common law unless already severed.²⁸ But this rule has been criticized and statutes in some of the states change the common law rule in some respects.²⁹ The property must be of some value.³⁰ But evidence of the precise value of property having some intrinsic value is unnecessary³¹ unless the grade of the offense or the

²² *Harrison v. People*, 50 N. Y. 518; *State v. Jackson*, 65 N. Car. 305; *Eckels v. State*, 20 Ohio St. 508.

²³ See also authorities reviewed in 88 Am. St. 584, 585, note.

²⁴ See, for example, *State v. Hecox*, 83 Mo. 531; *State v. Craige*, 89 N. Car. 475, 45 Am. R. 698; *Commonwealth v. Coffee*, 9 Gray (Mass.) 139; *Jolly v. United States*, 170 U. S. 402, 18 Sup. Ct. 624; *State v. Wellman*, 34 Minn. 221, 25 N. W. 395; *People v. Williams*, 24 Mich. 156, 9 Am. R. 119.

²⁵ *Culp v. State*, 1 Port. (Ala.) 33, 26 Am. Dec. 357; *United States v. Moulton*, 5 Mas. (U. S.) 537; see for illustrations of what are and what are not within this rule, 88 Am. St. 587, note.

²⁶ *State v. Murphy*, 8 Blackf. (Ind.) 498; *State v. Doe*, 79 Ind. 9, 41 Am. R. 599; *State v. Lymus*, 26 Ohio St. 400, 20 Am. R. 772; *Norton v. Ladd*, 5 N. H. 203, 20 Am. Dec. 573; *State v. Turner*, 66 N. Car. 618; *State v. Holder*, 81 N. Car. 527, 31

Am. R. 517; *Mullaly v. People*, 86 N. Y. 365.

²⁷ *Hamby v. Samson*, 105 Iowa 112, 74 N. W. 918, 67 Am. St. 285; *Harrington v. Miles*, 11 Kans. 480, 15 Am. R. 355; *State v. Langford*, 55 S. Car. 322, 33 S. E. 370; *Commonwealth v. Hazelwood*, 84 Ky. 681, 2 S. W. 489; *Mullaly v. People*, 86 N. Y. 365; *Hurley v. State*, 30 Tex. App. 333, 17 S. W. 455, 28 Am. St. 916.

²⁸ *Holly v. State*, 54 Ala. 238; *Langston v. State*, 96 Ala. 44, 11 So. 334; *Jackson v. State*, 11 Ohio St. 104; *Harberger v. State*, 4 Tex. App. 26, 30 Am. R. 157.

²⁹ See, 88 Am. St. 591, note.

³⁰ *Lane v. State*, 113 Ga. 1040, 39 S. E. 463; *State v. Lambert*, 21 Mo. App. 301; *People v. Loomis*, 4 Den. (N. Y.) 380; *Parker v. State*, 110 Ala. 688, 20 So. 1022.

³¹ *State v. Slack*, 1 Bailey L. (S. Car.) 330; see also, *Pooler v. State*, 97 Wis. 627, 73 N. W. 336; *Commonwealth v. Riggs*, 14 Gray (Mass.) 376; *Commonwealth v. McKenney*, 9

punishment or penalty depends upon the value, in which case it is necessary to prove such value as will bring the case within the statute.³² The identity of the property must be established, and a variance in the description may be fatal.³³ The property need not, ordinarily, be produced in court,³⁴ and it may frequently be identified by marks or brands thereon.³⁵ So, it has been held that a statute requiring marks and brands to be recorded makes the record thereof competent evidence.³⁶

§ 3053. Ownership.—As a general rule the property must be owned by some one other than the thief.³⁷ But there are exceptional cases in which one may be guilty of larceny in stealing his own property when it is done with the intent of charging another, as the bailee, for instance, with the value of the property.³⁸ And it is not essential that the thief should know who is the true owner if he knows that the property is not his own and he takes it to deprive the owner of it, whoever he may be.³⁹ A special ownership is suffi-

Gray (Mass.) 114; Whalen v. Commonwealth, 90 Va. 544, 19 S. E. 182.

³² State v. McCarty, 73 Iowa 51, 34 N. W. 606; Whitehead v. State, 20 Fla. 841; State v. Doepke, 68 Mo. 208, 30 Am. R. 785; as to evidence to show value, see, State v. Brown, 55 Kans. 611, 40 Pac. 1001; People v. Cole, 54 Mich. 238, 19 N. W. 968; Commonwealth v. Stebbins, 8 Gray (Mass.) 492.

³³ Wiley v. State, 74 Ga. 840; Robertson v. State, 97 Ga. 206, 22 S. E. 974; State v. Jackson, 30 Me. 29; Hooker v. State, 4 Ohio 348; Banks v. State, 28 Tex. 644; Keating v. People, 160 Ill. 480, 43 N. E. 724; see also, Johnson v. State, 119 Ga. 257, 45 S. E. 960.

³⁴ Spittorff v. State, 108 Ind. 171, 8 N. E. 911; Moore's Case, 2 Leigh (Va.) 701.

³⁵ State v. Ballard, 104 Mo. 634, 16 S. W. 525. A witness may describe them; Lockwood v. State, (Tex.) 26

S. W. 200; Tittle v. State, 30 Tex. App. 597, 17 S. W. 1118.

³⁶ Brooke v. People, 23 Colo. 375, 48 Pac. 502; Thompson v. State, 26 Tex. App. 466, 9 S. W. 760.

³⁷ People v. Mackinley, 9 Cal. 250; People v. Stone, 16 Cal. 369; Tervin v. State, 37 Fla. 396, 20 So. 551; Adams v. State, 45 N. J. L. 448; State v. Fitzpatrick, 9 Houst. (Del.) 385, 32 Atl. 1072; Alfele v. Wright, 17 Ohio St. 238, 93 Am. Dec. 615; Fields v. State, 6 Coldw. (Tenn.) 524; Williams v. State, 34 Tex. 558.

³⁸ Jones v. Jones, 71 Cal. 89, 11 Pac. 817; State v. Quick, 10 Iowa 451; Commonwealth v. Greene, 111 Mass. 392; Commonwealth v. Lannan, 153 Mass. 287, 26 N. E. 858, 25 Am. St. 629; 4 L. R. A. 292, note; 57 Am. Dec. 281, 282, note.

³⁹ Tervin v. State, 37 Fla. 396, 20 So. 551; People v. Dunn, 114 Mich. 355, 72 N. W. 172; Lawrence v. State, 20 Tex. App. 536.

cient,⁴⁰ and it has been held that possession is sufficient evidence of ownership.⁴¹ But ownership must usually be proved substantially as alleged.⁴² And the best evidence of ownership is usually the instrument under which the title is claimed,⁴³ but ownership of the personal property in larceny cases may generally be proved by parol, as by evidence of possession and the exercise of exclusive control and ordinary acts of ownership.⁴⁴

§ 3054. Non-consent.—As stated in the definition of larceny, the property must also be taken without the owner's consent.⁴⁵ The

⁴⁰ *Littleton v. State*, 20 Tex. App. 168; *State v. Moore*, 101 Mo. 316, 14 S. W. 182; *State v. Somerville*, 21 Me. 14; *United States v. Jackson*, 29 Fed. 503.

⁴¹ *State v. Bishop*, 98 N. Car. 773, 4 S. E. 357; see also, *Quinn v. People*, 123 Ill. 333, 15 N. E. 46; but compare, *State v. Repp*, 104 Iowa 305, 73 N. W. 829, 65 Am. St. 463.

⁴² *McDowell v. State*, 68 Miss. 348, 8 So. 508; *Clark v. State*, 29 Tex. App. 437, 16 S. W. 171; *State v. Burgess*, 74 N. Car. 272; *Commonwealth v. Trimmer*, 1 Mass. 476; *State v. McCoy*, 14 N. H. 364; but compare, *People v. Nunley*, 142 Cal. 105, 75 Pac. 676; *State v. Ireland*, (Idaho) 75 Pac. 257.

⁴³ *Edwards v. State*, 29 Tex. App. 452, 16 S. W. 98.

⁴⁴ *Morris v. State*, 84 Ala. 446, 4 So. 912; *State v. Robinson*, 35 La. Ann. 964; *Ledbetter v. State*, 35 Tex. 195, 32 S. W. 903; *State v. Bishop*, 98 N. Car. 773, 4 S. E. 357. In a recent case, which was a prosecution for larceny of clothing from a railroad car, the ownership was laid in the Lake Shore and Michigan Southern Railway Company, and several witnesses testified to the larceny from the car, which was broken open in the railroad yards. Defendant confessed to a special agent of the company that he committed the lar-

ceny "up there in the yard," and on trial did not testify or call a witness. It was held that the jury were warranted in finding the averment of ownership proved; and in the same case an employe of the shipper testified that the box containing the clothing was shipped on "the Lake Shore and Michigan Southern Railway," and other witnesses, describing themselves as employes of "Lake Shore and Michigan Southern," testified to facts showing the larceny from a car referred to as being at the time in the "Lake Shore Yards." It was held that the terms used by the witnesses in referring to the railroad being familiar, and there being a striking similarity between all of them and the name of the railroad as alleged, it was competent for the jury to infer that the company alleged was the bailee from whose custody the goods were stolen. *Griffiths v. State*, (Ind.) 72 N. E. 563.

⁴⁵ *Welsh v. People*, 17 Ill. 339; *State v. Adams*, 115 N. Car. 775, 20 S. E. 722; *People v. Hanselman*, 76 Cal. 460, 18 Pac. 425, 9 Am. St. 238; *McAdams v. State*, 8 Lea (Tenn.) 456; *Woods v. State*, 26 Tex. App. 490, 10 S. W. 108; *People v. Cruger*, 102 N. Y. 510, 7 N. E. 555, 55 Am. R. 830. Non-consent must be proved; *State v. Storts*, 138 Mo. 127, 39 S. W. 483; *Garcia v. State*, 26 Tex. 209.

mere fact that the owner does not prevent the theft, when he might have done so, or that he furnished an opportunity for its commission, for the purpose of detecting and arresting the thief, does not prove a consent on the part of the owner,⁴⁶ nor does the delivery of property by mistake,⁴⁷ or, as already shown, where it is induced by fraud when the fraud vitiates the apparent consent and the owner does not intend to part with his entire ownership. The testimony of the owner, or of his agent having management of the property, is admissible to prove non-consent.⁴⁸ It has been held that other evidence of non-consent is not admissible until the failure to produce or take the testimony of the owner or his agent has been accounted for.⁴⁹ But when this has been done, or, if it is not required, the non-consent may be shown by competent circumstantial evidence as well as by direct evidence.⁵⁰ So, it may be shown by the declarations of the accused.⁵¹

§ 3055. The intent.—The requisite felonious intent must be shown beyond a reasonable doubt.⁵² But it may be inferred from circum-

⁴⁶ *Varner v. State*, 72 Ga. 745; *State v. Adams*, 115 N. Car. 775, 20 S. E. 722; see also, *Pigg v. State*, 43 Tex. 108; *Alexander v. State*, 12 Tex. 540; *Conner v. State*, 24 Tex. App. 245, 6 S. W. 138; *People v. Hanselman*, 76 Cal. 460, 18 Pac. 425, 9 Am. St. 238; but compare, *State v. Hull*, 33 Ore. 56, 54 Pac. 159, 72 Am. St. 694; *McAdams v. State*, 8 Lea (Tenn.) 456; *Williams v. State*, 55 Ga. 391; *Speiden v. State*, 3 Tex. App. 156, 30 Am. R. 126; *Rex v. Macdaniel*, 2 East P. C. 665; *Reg. v. Reeves*, 5 Jur. N. S. 716.

⁴⁷ *Bailey v. State*, 58 Ala. 414; *Cooper v. Commonwealth*, 110 Ky. 123, 22 Ky. L. R. 1627, 60 S. W. 938; *State v. Ducker*, 8 Ore. 394, 34 Am. R. 590; *People v. Miller*, 4 Utah 410, 11 Pac. 514; *Fulcher v. State*, 32 Tex. Cr. App. 621, 25 S. W. 625; *Wolfstein v. People*, 6 Hun (N. Y.) 121.

⁴⁸ *State v. Moon*, 41 Wis. 684; *Bubster v. State*, 33 Neb. 663, 50 N. W.

953; *Wilson v. State*, 12 Tex. App. 481.

⁴⁹ *State v. Osborne*, 28 Iowa 9; *State v. Morey*, 2 Wis. (362) 494; see also, *Rema v. State*, 52 Neb. 375, 72 N. W. 474.

⁵⁰ *Carroll v. People*, 136 Ill. 456, 27 N. E. 18; *State v. Porter*, 26 Mo. 201; *State v. Skinner*, 29 Ore. 599, 46 Pac. 368; *Files v. State*, 36 Tex. Cr. App. 206, 36 S. W. 93; *Rains v. State*, 7 Tex. App. 588; *Sapp v. State*, (Tex. Cr. App.) 77 S. W. 456.

⁵¹ *People v. Dean*, 58 Hun (N. Y.) 610, 12 N. Y. S. 749.

⁵² *Long v. State*, 11 Fla. 295, 297; *Phelps v. People*, 55 Ill. 334; *Britt v. State*, 21 Tex. App. 215; *Waldley v. State*, 34 Neb. 250, 252, 51 N. W. 830; *Micheaux v. State*, 30 Tex. App. 660, 18 S. W. 550; *Pence v. State*, 110 Ind. 95, 10 N. E. 919; *State v. Fitzpatrick*, 9 Houst. (Del.) 385, 32 Atl. 1072; *Green v. State*, (Tex. Cr. App.) 33 S. W. 120; *Truslow v. State*, 95 Tenn. 189, 31 S. W. 987;

cient of itself to prove his guilt of the crime of larceny.⁶⁹ Proof of the removal and malicious destruction of property does not establish the felonious intent to steal it, which is a necessary ingredient in this crime.⁷⁰

§ 3057. Other crimes.—The general rule, elsewhere considered, to the effect that the commission by the defendant of other distinct and independent crimes does not prove that the defendant committed the crime in question and that evidence thereof is not, ordinarily, admissible, finds a frequent application in larceny cases.⁷¹ But the exception or the other branch of the rule, admitting evidence of other offenses under certain circumstances and for certain purposes also finds a frequent application in such cases.⁷² The general treatment of the subject elsewhere,⁷³ however, renders it unnecessary to do more in this connection than to refer to a few of the many cases in which the doctrines in question have been applied in prosecutions for larceny. This is done in the first two notes to this section.

§ 3058. Recent possession of stolen goods.—Another subject that has already received full consideration in a general way is that of the admissibility and effect of evidence of the recent possession of stolen goods.⁷⁴ A few additional remarks, however, with particular reference to such evidences in larceny cases, may not be out of place. As already shown, there is some conflict among the authorities as to whether there is any true presumption from the mere recent

⁶⁹ *Bailey v. State*, 52 Ind. 462; *Starck v. State*, 63 Ind. 285; *State v. Conway*, 18 Mo. 321.

⁷⁰ *Pence v. State*, 110 Ind. 95, 99, 10 N. E. 919.

⁷¹ *Dove v. State*, 37 Ark. 261; *McQueen v. State*, 108 Ala. 54, 18 So. 843; *People v. Tucker*, 104 Cal. 440, 38 Pac. 195; *State v. Vinson*, 63 N. Car. 335; *State v. Goetz*, 34 Mo. 85; *Miller v. Commonwealth*, 78 Ky. 16, 39 Am. R. 194; *Wilcox v. State*, 3 Heisk. (Tenn.) 110, 116; *Links v. State*, 13 Lea (Tenn.) 701; *Alexander v. State*, 21 Tex. App. 406; 17 S. W. 139; *State v. Johnson*, 38 La. Ann. 686.

⁷² *People v. Dimick*, 107 N. Y. 13,

14 N. E. 198; *People v. Dowling*, 84 N. Y. 478; *Snapp v. Commonwealth*, 82 Ky. 173; *State v. Weaver*, 104 N. Car. 758; 10 S. E. 486; *State v. Schaffer*, 70 Iowa 371, 30 N. W. 639; *Ballow v. State*, 42 Tex. Cr. App. 263, 58 S. W. 1023; *McIver v. State*, (Tex. Cr. App.) 60 S. W. 50; *Johnson v. State*, 148 Ind. 522, 525, 47 N. E. 926; see also dissenting opinion in, *Strong v. State*, 86 Ind. 208, approved in, *Crum v. State*, 148 Ind. 401, 47 N. E. 833.

⁷³ See, chap. 127, § 2720; also chap. 138, § 2917.

⁷⁴ See, chap. 127, § 2725; also chap. 138, § 2918.

possession of stolen goods, and as to whether conviction can be sustained without additional evidence upon the subject. It is generally held, however, in larceny as well as other cases, that it is at least a circumstance to be considered, and its weight and that of any explanation given by the accused should usually be left to the jury.⁷⁵ In a recent case, on the trial of a prosecution for larceny of a bill of a certain denomination, evidence that shortly after the commission of the offense the wife of the accused was in possession of a bill of the same denomination, and that she sent it by another person to the bank to be changed, was held admissible.⁷⁶ It is generally incompetent to show that the accused had in his possession other goods than those stolen at the time in question.⁷⁷ But such evidence has been held admissible in some cases for certain purposes.⁷⁸ So, where it is shown that the other goods were stolen at the same time, the recent possession of them by the accused may often be shown as tending to connect him with the offense.⁷⁹

⁷⁵ *Stafford v. State*, (Ga.) 48 S. E. 903; *State v. Lax*, (N. J.) 59 Atl. 18; *State v. Ireland*, (Idaho) 75 Pac. 257; *State v. King*, 122 Iowa 1, 96 N. W. 712; but the corpus delicti must be proved; *Reg. v. Hall*, 1 Cox Cr. Cas. 231; *Thomas v. State*, 109 Ala. 25, 19 So. 403; *Hand v. State*, 110 Ga. 257, 34 S. E. 286; *Bailey v. State*, 52 Ind. 462, 21 Am. R. 182; but this may be done by circumstantial evidence; *State v. Clark*, 4 Strob. L. (S. Car.) 311; *State v. Peterson*, 38 Kans. 204, 16 Pac. 263; *Johnson v. State*, 47 Ala. 62; *State v. Minor*, 106 Iowa 642, 77 N. W. 330; *Reg. v. Burton*, 6 Cox Cr. Cas. 293.

⁷⁶ *Buckine v. State*, (Ga.) 49 S. E. 257; in a prosecution for larceny where there was evidence that defendant took a gold piece of a certain denomination from witness' person while they were together in a room, and defendant was thereupon arrested, further testimony

that about half an hour after the arrest the policeman and witness returned to the room, and, upon search, found a gold piece of the same denomination secreted on the dresser, was held admissible, although the witness could not identify the particular piece of money as his own; *State v. Johnson*, (Wash.) 78 Pac. 903.

⁷⁷ *Reg. v. Oddy*, T. & M. 593, 5 Cox Cr. Cas. 210.

⁷⁸ See, *State v. Ditton*, 48 Iowa 677; *State v. Moore*, 101 Mo. 316, 14 S. W. 182; *State v. Murphy*, 84 N. Car. 742; *Yarborough v. State*, 41 Ala. 405; *State v. Robinson*, 35 S. Car. 340; *Slaughter v. Commonwealth*, 22 Ky. L. R. 679, 58 S. W. 588.

⁷⁹ *Yarborough v. State*, 41 Ala. 405; *Johnson v. State*, 148 Ind. 522, 47 N. E. 926; *People v. Robles*, 34 Cal. 591; *Wormly v. State*, 70 Ga. 721; *State v. Weaver*, 104 N. Car. 758, 10 S. E. 486.

§ 3059. **Defenses.**—As a general rule, it may be said that the defendant may introduce any proper evidence legitimately tending to prove that he did not commit the crime for which he is on trial, or to rebut the evidence introduced by the state. Thus, he may explain his possession of the stolen goods,⁸⁰ and upon this subject it is said in a recent text book:⁸¹ “He may prove that he bought the goods,⁸² that he offered to pay the owner for them,⁸³ or that he became possessed of them, believing he was the owner’s agent.⁸⁴ These and other explanatory facts may be shown even where the defendant has failed or refused to give a satisfactory explanation of the possession of the property when it was first found in his possession.⁸⁵ If the explanatory evidence creates a reasonable doubt in the minds of the jurors that he stole the property, he should be acquitted.⁸⁶ It is not absolutely requisite that the accused should prove that his possession was honest. It is sufficient to acquit him if he gives a natural, reasonable and probable explanation which the prosecution does not show to be false.⁸⁷ Such an explanation may be taken as true if the state, relying upon recent possession alone, does not prove its falsity or attempt to do so.⁸⁸ If the explanation is absurd, unreasonable or unsatisfactory it is the right of the jury, and often their duty, to disregard it, though no evidence in rebuttal on that point is

⁸⁰ Even his own testimony; *State v. Bethel*, 97 N. Car. 459, 1 S. E. 551.

⁸¹ *Underhill Cr. Ev.*, § 302.

⁸² *Jones v. People*, 12 Ill. 259; including all pertinent declarations made by himself or the vendors; *People v. Dowling*, 84 N. Y. 478, 485.

⁸³ *Hall v. State*, 34 Ga. 208, 210.

⁸⁴ *Lewis v. State*, 29 Tex. App. 201, 15 S. W. 642; *Chambers v. State*, 62 Miss. 108.

⁸⁵ *Harris v. State*, 15 Tex. App. 411.

⁸⁶ *State v. Peterson*, 67 Iowa 564, 567, 25 N. W. 780; *Grentzinger v. State*, 31 Neb. 460, 462, 48 N. W. 148; *Clark v. State*, 30 Tex. App. 402, 17 S. W. 942; *Baker v. State*, 80 Wis. 416, 50 N. W. 518; *Blaker v. State*, 130 Ind. 203, 29 N. E. 1077; *State v. Wilson*, 95 Iowa 341, 64 N. W. 26; *State v. Cross*, 95 Iowa 629,

64 N. W. 614; *Gilmore v. State*, (Tex. Cr. App.) 33 S. W. 120; *Crawford v. State*, 113 Ala. 661, 21 So. 64; *State v. Dillon*, 48 La. Ann. 1365, 20 So. 913.

⁸⁷ *Hart v. State*, 22 Tex. App. 563, 3 S. W. 741; *Garcia v. State*, 26 Tex. 209, 210; *State v. Moore*, 101 Mo. 316, 14 S. W. 182; *Jones v. State*, 30 Miss. 653, 655; *State v. Castor*, 93 Mo. 242, 250, 5 S. W. 906; *Yarbrough v. State*, 115 Ala. 92, 22 So. 534.

⁸⁸ *People v. Hurley*, 60 Cal. 74; *Powell v. State*, 11 Tex. App. 401, 402; *Johnson v. State*, 12 Tex. App. 385; *State v. Kimble*, 34 La. Ann. 392, 395; 3 *Greenleaf Ev.* 32; see also, *Leslie v. State*, 35 Fla. 171, 17 So. 555; *York v. State*, 17 Tex. App. 441.

offered.⁸⁹ But when the explanation offered is reasonable and probable it must be overcome and its falsity shown by positive and definite evidence. Direct evidence is not always essential. Circumstantial evidence will answer if upon all the evidence the prosecutor shall succeed in convincing the jury of the guilt of the prisoner beyond a reasonable doubt.⁹⁰ His declarations explaining his possession are also admissible, in a proper case, at least when part of the *res gestae*.⁹¹ But, of course, such declarations are not usually admissible when self-serving and after he has had time to concoct an explanation.⁹² The defendant may also prove an alibi.⁹³ So, he may show that he obtained the consent of the owner, or, in some cases, of the supposed owner,⁹⁴ and other evidence tending to show good faith, absence of any felonious intent and facts inconsistent with guilt may be competent.⁹⁵ So, while slight weakness of mind or voluntary intoxication will not justify a crime, nor even excuse it, ordinarily, yet evidence thereof is admissible as bearing upon the question of intent.⁹⁶ And the accused may likewise introduce evidence of his good character.⁹⁷

⁸⁹ *Tilly v. State*, 21 Fla. 242; see also, to the effect that the weight of the explanation is for the jury, *State v. Ireland*, (Idaho) 75 Pac. 257; *State v. King*, 122 Iowa 1, 96 N. W. 712.

⁹⁰ *Franklin v. State*, 37 Tex. Cr. App. 312, 39 S. W. 680; *State v. Schaffer*, 70 Iowa 371, 375, 30 N. W. 639; *Brown v. State*, 34 Tex. Cr. App. 150, 29 S. W. 772; see also, *State v. Kimble*, 34 La. Ann. 392; *Van Straaten v. People*, 26 Colo. 184, 56 Pac. 905.

⁹¹ *Henderson v. State*, 70 Ala. 23; *Hubbard v. State*, 109 Ala. 1, 19 So. 519; *State v. Moore*, 101 Mo. 316, 14 S. W. 182; *Walker v. State*, 28 Ga. 254; *State v. Daley*, 53 Vt. 442, 38 Am. R. 694; *Reg. v. Abraham*, 2 Car. & Kir. 550, 61 E. C. L. 550.

⁹² *Cooper v. State*, 63 Ala. 80; *State v. Moore*, 101 Mo. 316, 14 S. W. 182.

⁹³ *State v. Sidney*, 74 Mo. 390; *Wilburn v. Territory*, 10 N. Mex. 402, 62 Pac. 968.

⁹⁴ *State v. Matthews*, 20 Mo. 55; but see, *Drumright v. State*, 29 Ga. 480.

⁹⁵ See, *State v. Eubank*, 33 Wash. 298, 74 Pac. 378; *State v. Marquardsen*, 7 Idaho 352, 62 Pac. 1034; *People v. Cline*, 74 Cal. 575, 16 Pac. 391; *Jones v. State*, 30 Miss. 653, 64 Am. Dec. 154; *Way v. State*, 35 Ind. 409.

⁹⁶ *Robinson v. State*, 113 Ind. 510, 16 N. E. 184; see also, 36 L. R. A. 469.

⁹⁷ *People v. Hurley*, 60 Cal. 74, 44 Am. R. 55; *State v. Richart*, 57 Iowa 245, 10 N. W. 657; *Clackner v. State*, 33 Ind. 412; *Foster v. State*, 52 Miss. 695; *State v. Crank*, 75 Mo. 406; but see, *Wagner v. State*, 107 Ind. 71, 7 N. E. 896.

§ 3059a. **Miscellaneous—Recent cases.**—It has been held that it is sufficient in case of theft of money from a person to show that any part of the money alleged in the indictment was taken, and that the fact that the theft was committed after the time alleged is no ground for acquittal.⁹⁸ So, where the indictment charged the stealing of one double case silver watch, and the evidence showed that the accused took from the jeweler's bench the case and works, which had been separated for the purpose of repair, it was held that the variance, if any, was not fatal.⁹⁹ The prosecuting witness may testify to the ownership of the property.¹⁰⁰ Although, as already shown, there must be a carrying away or taking, it is held in a recent case that there may be a conviction notwithstanding the money alleged to have been stolen by the defendant was never seen in his possession.¹⁰¹ It is also held in the same case that although evidence of motive was not indispensable it was nevertheless admissible, and that it was not error to admit evidence that the defendant was in debt at the time as tending to some extent to show a motive for the crime, especially as the evidence of the larceny by the defendant was largely circumstantial.

⁹⁸ *Green v. State*, (Tex. Cr. App.) 86 S. W. 332; see also, *Com. v. Dingman*, 26 Pa. Super. Ct. 615.

⁹⁹ *Patterson v. State*, (Ga.) 50 S. E. 489; see also, *Crawford v. State*, 94 Ga. 772, 21 S. E. 992; *Payne v. State*, 140 Ala. 148, 37 So. 74.

¹⁰⁰ *Bennett v. State*, (Ark.) 84 S. W. 483.

¹⁰¹ *Demmick v. United States*, 135 Fed. 257. For recent cases holding the evidence sufficient to sustain a conviction, see, *Crockford v. State*, (Neb.) 102 N. W. 70; *Territory v.*

Clark, (N. Mex.) 79 Pac. 708; *Davis v. Territory*, (Ariz.) 80 Pac. 389; *Jones v. People*, (Colo.) 79 Pac. 1013; *State v. Minck*, (Minn.) 102 N. W. 207; *State v. Mumford*, (Kans.) 79 Pac. 669; *Ware v. State*, (Tex. Cr. App.) 84 S. W. 1065. For cases in which the evidence was held insufficient, see, *Wesley v. State*, (Tex. Cr. App.) 85 S. W. 802; *Womack v. State*, (Tex. Cr. App.) 86 S. W. 1015; *Brokaw v. State*, (Tex. Cr. App.) 85 S. W. 801; *Bird v. State*, (Fla.) 37 So. 525.

CHAPTER CXLVII.

NUISANCE.

Sec.	Sec.
3060. Generally.	3066. Obstructing highways.
3061. Examples of public nuisance.	3067. Obstructing or polluting waters.
3062. Evidence for prosecution.	3068. Public indecency.
3063. Evidence of reputation.	3069. Storing explosives.
3064. Defenses.	
3065. Disorderly houses.	

§ 3060. **Generally.**—The subject of this chapter in so far as individual citizens and their rights and remedies are concerned has been treated in another volume.¹ A definition of a public as well as a private nuisance is there given and the general subject is there treated to such an extent that comparatively little remains to be said in this connection. It may be well, however, to give another definition of a public or common nuisance and to further explain its general nature before considering the law in detail with particular reference to criminal prosecutions. A public or common nuisance is an “offense against the public order and economical regimen of the state,” being either the doing of a thing to the annoyance of the citizens generally, and not merely to some particular person, or the neglecting to do a thing which the common good requires.² More particularly, a common nuisance “is said to comprehend endangering the public personal safety or health; or doing, causing, occasioning, promoting, maintaining, or continuing what is noisome and offensive, or annoying and vexatious, or plainly hurtful to the public, or is a public outrage against common decency or common morality, or tends plainly and directly to the corruption of the morals, honesty, and good habits of the people; the same being without authority or justification by law.”³

¹ Vol. III, chap 116.

² 2 Bouvier L. Dict. 524; 1 Hawk-
ins P. C. 197; 4 Blackstone Comm.
166; 3 Greenleaf Ev., § 184; 8 Bacon
Abridgment 223; State v. Mayor &c.,

5 Port. (Ala.) 279, 311; see also,
Acme Fertilizer Co. v. State, (Ind.
App.) 72 N. E. 1037; State v. Tabler,
(Ind. App.) 72 N. E. 1039.

³ Report of Mass. Comr's on Cr.

§ 3061. Examples of public nuisance.—Among the things that most often constitute public nuisances are the keeping of disorderly houses, obstructing highways or navigable streams and waters, polluting waters, maintaining offensive and stagnant ponds, making noises and the like so as to disturb the public peace, being a common scold, or a common eavesdropper, committing public indecency and the storing and keeping of dangerous explosives at an improper place so as to endanger the public. So, public as well as private nuisances may arise from carrying on a business or trade so as to create offensive and noxious smells, smoke and the like. The most important of these will be considered in subsequent sections.

§ 3062. Evidence for prosecution.—“In proof of the charge, evidence must be adduced to show, 1st, that the act complained of was done by the defendant; and this will suffice, though he acted as the agent or servant and by the command of another;⁴ 2nd, that it was to the common injury of the public, and not a matter of mere private grievance.”⁵ The annoyance must be such and to such a number of people that the offense is to be deemed a public rather than a mere private nuisance, but it is not necessary that it should injuriously affect all the people of the state nor even every member of the community.⁶

§ 3063. Evidence of reputation.—As a general rule a nuisance cannot be shown by evidence of reputation, but there are nuisances in which evidence of the reputation of the inmates or frequenters of a certain house or place, and, perhaps, even of the reputation of such

Law, Common Nuisance, § 1, referred to in, 3 Greenleaf Ev., § 184; for other definitions see, *Bohan v. Port Jervis Gas-L. Co.*, 122 N. Y. 18, 32, 25 N. E. 246; *State v. Wolf*, 112 N. Car. 889, 17 S. E. 528; *Commonwealth v. Smith*, 6 Cush. (Mass.) 80; *State v. Godwinsville &c. Co.*, 49 N. J. L. 270, 10 Atl. 666.

⁴ *State v. Bell*, 5 Port. (Ala.) 365; *State v. Matthis*, 1 Hill (S. Car.) 37; *Commonwealth v. Mann*, 4 Gray (Mass.) 213; see also, *Rex v. Medley*, 6 Car. & P. 292; or, notwithstanding others contributed. *Den-*

nis v. State, 91 Ind. 291; *Rex v. Neil*, 2 Car. & P. 485, 12 E. C. L. 690. But his act must have been a proximate cause. *State v. Holman*, 104 N. Car. 861, 10 S. E. 758.

⁵ *State v. Luce*, 9 Houst. (Del.) 396, 32 Atl. 1076; *State v. Wolfe*, 112 N. Car. 889, 17 S. E. 528; *Innes v. Newman*, L. R. 2 Q. B. (1894), 292; 3 Greenleaf Ev., § 186.

⁶ *People v. Jackson*, 7 Mich. 432, 74 Am. Dec. 729; *Hackney v. State*, 8 Ind. 494; 2 Chitty Cr. Law 607; *State v. Tabler*, (Ind. App.) 72 N. E. 1039, 1040.

house or place may be admissible. It is said by Mr. Wharton that "where an offense is laid generally in the indictment, as where the defendant is charged as a common barrator, or a common scold, or as keeping a common gambling house, or disorderly house, evidence of general reputation is not admissible, it being necessary to sustain the indictment, that the particular facts which constitute the offense should be proved."⁷ He further says, however, that on indictments for keeping houses of ill-fame, when such is the statutory term describing the offense, the "ill-fame" or bad reputation of the house may be put in evidence,⁸ and that "the bad reputation of the visitors is in any view competent evidence,"⁹ but that in the case of a disorderly house particular acts of disorder rather than the reputation of the house must be shown.¹⁰ It is generally agreed that the reputation of the inmates and visitors is admissible in a proper case, but there is some conflict as to the other statement of Mr. Wharton to the effect that the reputation of the house itself is not admissible unless the statute clearly makes the reputation and not merely the character of the house an element of the offense. As will be shown in the section on disorderly houses, there are many jurisdictions in which the reputation of the house may be shown, and in some of them the statutes do not seem to have changed the common law.

⁷ Wharton Cr. Law, § 260; citing, *Commonwealth v. Stewart*, 1 S. & R. (Pa.) 342; *Archbold Cr. Pl.* 105; *Commonwealth v. Hopkins*, 2 Dana (Ky.) 418; but see, *Kissel v. Lewis*, 156 Ind. 233, 59 N. E. 478; *World v. State*, 50 Md. 49; *Fong Yuk, In Re*, (1901), 8 Br. Col. 118; *Demartini v. Anderson*, 127 Cal. 33, 59 Pac. 207; *State v. Hendricks*, 15 Mont. 194, 39 Pac. 94; see, 20 L. R. A. 610-612, note.

⁸ Citing, *United States v. Gray*, 2 Cranch. (N. S.) 675; *United States v. Stevens*, 4 Cranch (U. S.) 341; *Cadwell v. State*, 17 Conn. 467; *State v. Morgan*, 40 Conn. 44; *People v. Lockwing*, 61 Cal. 380; *People v. Buchanan*, 1 Idaho 681; but see, *Parker v. People*, 94 Ill. App. 648; *State v. Plant*, 67 Vt. 454, 32 Atl. 237, 48 Am. St. 821.

⁹ Citing, *State v. Boardman*, 64 Me. 523; *State v. McGregor*, 41 N. H. 407; *Commonwealth v. Gannett*, 1 Allen (Mass.) 7; *Commonwealth v. Kimball*, 7 Gray (Mass.) 328; *Harwood v. People*, 26 N. Y. 190; *Sparks v. State*, 59 Ala. 82; *O'Brien v. People*, 28 Mich. 213; *King v. State*, 17 Fla. 183; *Morris v. State*, 38 Tex. 603; *Clementine v. State*, 14 Mo. 112; *State v. Brunell*, 29 Wis. 435; see also, *State v. McDowell, Dudley* (S. Car.) 346; *Commonwealth v. Clark*, 145 Mass. 251, 13 N. E. 388; *Howard v. People*, 27 Colo. 396, 61 Pac. 595; *Beard v. State*, 71 Md. 275, 17 Atl. 1044, 4 L. R. A. 675.

¹⁰ Citing, *State v. Foley*, 45 N. H. 466; *United States v. Jourdine*, 4 Cranch (U. S.) 338; *Commonwealth v. Stewart*, 1 S. & R. (Pa.) 342;

§ 3064. **Defenses.**—In defense, proper evidence is, of course, admissible to show any facts tending to disprove or, in a proper case, to justify the charge.¹¹ But the law does not, ordinarily at least, balance conveniences, and the defendant will not be permitted to show as a defense that the public benefit resulting from his act is equal to the public inconvenience which arises from it.¹² Neither is it a good defense that similar nuisances are tolerated elsewhere even in the same neighborhood.¹³ Nor is the motive or intent, as a rule, material, for, even though the act constituting the nuisance was committed without any improper motive, this would not be a defense.¹⁴ The fact that the act is authorized by a constitutional and valid enactment of the legislature will constitute a defense to the criminal prosecution even though it would otherwise be a public nuisance.¹⁵ But a right to maintain a public nuisance, as against the public, cannot be gained by prescription.¹⁶ In other words, no length

Commonwealth v. Hopkins, 2 Dana (Ky.) 418; but see, 20 L. R. A. 610-612, note, for review of conflicting authorities.

¹¹ 3 Greenleaf Ev., § 187.

¹² *Rex v. Ward*, 4 Ad. & El. 384, 81 E. C. L. 180; *Reg. v. Train*, 2 B. & S. 640, 110 E. C. L. 640; *State v. Kaster*, 35 Iowa 221; *Seacord v. People*, 121 Ill. 623, 13 N. E. 194; *Baltimore &c. Tpk. Road v. State*, 63 Md. 573.

¹³ *Rex v. Nell*, 2 Car. & P. 485, 12 E. C. L. 690; *Dennis v. State*, 91 Ind. 291; *Commonwealth v. Perry*, 139 Mass. 198, 29 N. E. 656; see also, *Euler v. Sullivan*, 75 Md. 616, 23 Atl. 845, 32 Am. St. 420; *People v. Mallory*, 4 Thomp. & C. (N. Y.) 567; *Hurlbut v. McKone*, 55 Conn. 31, 3 Am. St. 17; *Stephens v. Gardner Creamery Co.*, 9 Kans. App. 883, 57 Pac. 1058.

¹⁴ *Reg. v. Stephens*, L. R., 1 Q. B. 702; *People v. Burtleson*, 14 Utah 258, 47 Pac. 87; *Seacord v. People*, 121 Ill. 623, 13 N. E. 194. Compare, *State v. Linkhaw*, 69 N. Car. 214, 12 Am. R. 645. So the fact that a land-

lord made his tenant agree not to maintain a nuisance, or to be liable therefor, has been held no defense. *Peacock Distillery Co. v. Commonwealth*, 25 Ky. L. R. 1778, 78 S. W. 893.

¹⁵ *State v. Louisville &c. R. Co.*, 86 Ind. 114; *State v. Barnes*, 20 R. I. 525, 40 Atl. 374; *People v. Law*, 34 Barb. (N. Y.) 494; *Commonwealth v. Reed*, 34 Pa. St. 275; *Stoughton v. State*, 5 Wis. 291; *Commonwealth v. Boston*, 97 Mass. 555; *Rex v. Pease*, 4 B. & Ad. 30, 24 E. C. L. 24; *Danville &c. R. Co. v. Commonwealth*, 73 Pa. St. 29; see also, *Commonwealth v. Packard*, 185 Mass. 64, 69 N. E. 1067.

¹⁶ *Rex v. Cross*, 3 Campb. 224; *State v. Phipps*, 4 Ind. 515; *Ashbrook v. Commonwealth*, 1 Bush (Ky.) 139, 89 Am. Dec. 616; *Commonwealth v. Upton*, 6 Gray (Mass.) 473; *State v. Holman*, 104 N. Car. 861, 10 S. E. 758; *Commonwealth v. McDonald*, 16 S. & R. (Pa.) 390; *State v. Louisville &c. R. Co.*, 86 Ind. 114; 30 Am. St. 557, note.

of time will justify a public nuisance.¹⁷ The extent to which the legislature or a municipality may go in declaring a thing to be a nuisance or in authorizing what would otherwise be a nuisance has been sufficiently considered in another volume.¹⁸

§ 3065. Disorderly houses.—A disorderly house was a public nuisance at common law, and even in states in which the common law as to crimes has not been adopted there are generally statutes to much the same effect. The chief question that may be considered as at all peculiar or deserving of special treatment in this connection is that relating to evidence of character or reputation and to evidence of specific acts, although it may be well to state in passing that the evidence must sufficiently connect the defendant with the keeping of the house as alleged,¹⁹ and that common reputation or rumor is not sufficient of itself, even if competent, to prove that he is the keeper of the house.²⁰ But it may be shown by circumstantial evidence.²¹ In many jurisdictions it is held that on a prosecution for keeping a disorderly house, or permitting it to be so used as to make it disorderly, evidence of the general reputation of the house is admissible as tending to prove that it was disorderly.²² But, perhaps

¹⁷ *People v. Cunningham*, 1 Denio (N. Y.) 524, 536; *People v. Gold Run &c. Co.*, 66 Cal. 155, 4 Pac. 1150; *Commonwealth v. Alburger*, 1 Whart. (Pa.) 469; 1 L. R. A. 296, note.

¹⁸ Vol. III, chap. 116, § 2527.

¹⁹ *Humphries v. State*, (Tex. Cr. App.) 68 S. W. 681; *Hamilton v. State*, (Tex. Cr. App.) 60 S. W. 39; *People v. Wright*, 90 Mich. 362, 51 N. W. 517; *Bindernagle v. State*, 61 N. J. L. 259, 38 Atl. 973, 39 Atl. 360.

²⁰ *Loraine v. State*, 22 Tex. App. 640, 3 S. W. 340; *People v. Saunders*, 29 Mich. 269.

²¹ *State v. Worth*, R. M. Charl. (Ga.) 5; *State v. Hand*, 7 Iowa 411, 71 Am. Dec. 453; *State v. Wells*, 46 Iowa 662; *United States v. Miller*, 4 Cranch (U. S.) 104; evidence of an inmate is held not to be that of an accomplice in, *Stone v. State*, (Tex. Cr. App.) 85 S. W. 808.

²² *Howard v. People*, 27 Colo. 396, 61 Pac. 595; *Territory v. Chartrand*, 1 Dak. 379, 46 N. W. 583; *Territory v. Stone*, 2 Dak. 155, 4 N. W. 697; *King v. State*, 17 Fla. 183; *Hogan v. State*, 76 Ga. 82; *People v. Buchanan*, 1 Idaho 681, 688; *Territory v. Bowen*, 2 Idaho 607, 23 Pac. 82; *Betts v. State*, 93 Ind. 375; *Whitlock v. State*, 4 Ind. App. 432, 30 N. E. 934; *State v. Mack*, 41 La. Ann. 1079, 6 So. 808; *State v. West*, 46 La. Ann. 1009, 15 So. 418; *O'Brien v. People*, 28 Mich. 213; *People v. Gastro*, 75 Mich. 127, 42 N. W. 937; *State v. Smith*, 29 Minn. 193, 12 N. W. 524; *State v. Bresland*, 59 Minn. 281, 61 N. W. 450; *State v. Hendricks*, 15 Mont. 194, 39 Pac. 93, 48 Am. St. 666; *Drake v. State*, 14 Neb. 535, 17 N. W. 117; *Nelson v. Territory*, 5 Okla. 512, 49 Pac. 920; *Sprague v. State*, (Tex. Cr. App.) 44 S. W. 837; *Forbes v. State*, 35 Tex.

the weight of authority is that such evidence is incompetent, unless it is made competent by statute, on the ground that the disorderly character of the house must be shown as a fact, and not by hearsay evidence of reputation.²³ The disorderly character of the house may, however, be shown by evidence that crowds of disorderly people went in and out,²⁴ or that it was commonly resorted to for immoral and illegal purposes, such as prostitution,²⁵ or the like,²⁶ and the acts and immoral conversation of its inmates and frequenters in and about the house, or in some instances, even elsewhere or in the absence of the accused, may be shown in a proper case.²⁷ So, knowledge on the part of the defendant, when necessary, may be shown by circumstantial evidence.²⁸ The weight of authority is, perhaps, to the effect that evidence of the bad character or reputation of the defendant, as keeper, is incompetent in the first instance,²⁹ but the question de-

Cr. App. 24, 29 S. W. 784; *Harkey v. State*, 33 Tex. Cr. App. 100, 25 S. W. 291, 47 Am. St. 19. Under some of the statutes the reputation of the house would seem to be directly in issue, and evidence thereof would clearly be competent.

²³ *Wooster v. State*, 55 Ala. 217; *Toney v. State*, 60 Ala. 97; *Sparks v. State*, 59 Ala. 82; *Parker v. People*, 94 Ill. App. 648; *State v. Lyon*, 39 Iowa 379; *State v. Lee*, 80 Iowa 75, 45 N. W. 545, 20 Am. St. 401; *Smith v. Commonwealth*, 6 B. Mon. (Ky.) 21; *State v. Boardman*, 64 Me. 523; *Henson v. State*, 62 Md. 231, 50 Am. R. 204; *Handy v. State*, 63 Miss. 207, 56 Am. R. 803; *State v. Bean*, 21 Mo. 267; *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247; *State v. Foley*, 45 N. H. 466; *Heflin v. State*, 20 N. J. L. J. 151; *People v. Mauch*, 24 How. Pr. (N. Y.) 276; *Nelson v. Territory*, 5 Okla. 512, 49 Pac. 920; *Commonwealth v. Stewart*, 1 S. & R. (Pa.) 342, and authorities cited in § 3063 on evidence of reputation.

²⁴ *Commonwealth v. Davenport*, 2 Allen (Mass.) 299; *State v. Robertson*, 86 N. Car. 628; *State v. McGahan*, 48 W. Va. 438, 37 S. E. 573.

²⁵ *Commonwealth v. Goodall*, 165 Mass. 588, 43 N. E. 520; *Cahn v. State*, 110 Ala. 56, 20 So. 380; *State v. Young*, 96 Iowa 262, 65 N. W. 160.

²⁶ See, *People v. Russell*, 110 Mich. 46, 67 N. W. 1099; *Reg. v. Rice*, L. R., 1 C. C. 21, 10 Cox Cr. Cas. 155; *Weideman v. State*, 4 Ind. App. 397, 30 N. E. 920.

²⁷ *State v. Boardman*, 64 Me. 523; *State v. Garing*, 75 Me. 591; *Binder-nagle v. State*, 60 N. J. L. 307, 37 Atl. 619; *State v. Toombs*, 79 Iowa 741, 45 N. W. 300; *State v. Main*, 31 Conn. 572; *Herzinger v. State*, 70 Md. 278, 17 Atl. 81; *Beard v. State*, 71 Md. 275, 17 Atl. 1044, 17 Am. St. 536, 4 L. R. A. 675; *Commonwealth v. Dam*, 107 Mass. 210; *Commonwealth v. Cardoze*, 119 Mass. 210; but see, *Commonwealth v. Harwood*, 4 Gray (Mass.) 41, 64 Am. Dec. 49.

²⁸ *Harwood v. People*, 26 N. Y. 190, 84 Am. Dec. 175; *State v. Schaffer*, 74 Iowa 704, 39 N. W. 89; *State v. Wells*, 46 Iowa 662; *Graeter v. State*, 105 Ind. 271, 4 N. E. 461; *Ward v. People*, 23 Ill. App. 510.

²⁹ *State v. Hand*, 7 Iowa 411, 71 Am. Dec. 453; *State v. Mack*, 41 La. Ann. 1079, 6 So. 808; *United States*

pende somewhat on local statutes, and there is some conflict among the authorities. It is said that Indiana, Wisconsin and South Carolina affirm the competency of such evidence and the other states deny it.³⁰ The question does not seem to have been decided, however, in every state, and there are some jurisdictions, in addition to those mentioned, in which such evidence is admitted in a proper case.³¹ But a petition of citizens to the city council, in which the defendant is referred to as a lewd woman, is incompetent.³²

§ 3066. Obstructing highways.—Any permanent unauthorized obstruction to a public street or highway is a public nuisance.³³ It may be on, beneath or above the surface of the highway.³⁴ Indeed, an obstruction may be a nuisance although not permanent in its nature,³⁵ and an unlawful interference with a highway may be a nui-

v. Nailor, 4 Cranch (U. S.) 372; *Gamel v. State*, 21 Tex. App. 357, 17 S. W. 158; *State v. Hull*, 18 R. I. 207, 26 Atl. 191, 20 L. R. A. 609. Conduct and admissions of the accused tending to show the bad character of the house and that he or she was the keeper, may be proved in a proper case. *Commonwealth v. Dam*, 107 Mass. 210; *Sullivan v. State*, 75 Wis. 650, 44 N. W. 647; *State v. McGregor*, 41 N. H. 407.

³⁰ 20 L. R. A. 610, note. Bad character of the lessor indicted for leasing a house for prostitution cannot, however, be shown in the first instance, in Indiana. *Graeter v. State*, 105 Ind. 271, 4 N. E. 461. But the terms of the lease may be admissible. *People v. Saunders*, 29 Mich. 269.

³¹ *Whittock v. State*, 4 Ind. App. 432, 30 N. E. 934; *State v. McDowell*, *Dudley* (S. Car.) 346; *State v. Brunell*, 29 Wis. 435; *Sparks v. State*, 59 Ala. 82; *Howard v. People*, 27 Colo. 396, 61 Pac. 595; *State v. Hendricks*, 15 Mont. 194, 39 Pac. 93, 48 Am. St. 666, the keeper being an inmate. See also, *Dailey v. State*, (Tex. Cr. App.) 55 S. W. 823; see

generally as to proof of good or bad character of the accused, and the time to which it may relate, 20 L. R. A. 612, 613, note.

³² *Howard v. People*, 27 Colo. 396, 61 Pac. 595; see also, *Allen v. State*, 15 Tex. App. 320.

³³ *Elliott Roads & Streets* (2nd ed.), § 645; *State v. Berdetta*, 73 Ind. 185, 38 Am. R. 117 (fruit stand); *Pettis v. Johnson*, 56 Ind. 139; *Costello v. State*, 108 Ala. 45, 18 So. 820, 35 L. R. A. 303; *Commonwealth v. Blaisdell*, 107 Mass. 234; *Smith v. State*, 23 N. J. L. 712; *People v. Maher*, 141 N. Y. 330, 36 N. E. 396; *State v. Leaver*, 62 Wis. 387, 22 N. W. 576; *Rex v. Jones*, 3 Campb. 230; *Hibbard v. Chicago*, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621; *Smith v. McDowell*, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393; *Young v. Rothrock*, 121 Iowa 588, 96 N. W. 1105, 1107.

³⁴ *Bybee v. State*, 94 Ind. 443; see also, *Reimer's Appeal*, 100 Pa. St. 182, 45 Am. R. 373; *Reg. v. Watts*, 1 Salk. 357; *Elliott Roads & Streets* (2nd ed.), § 647.

³⁵ *Elliott Roads & Streets* (2nd ed.), § 648; see also *Commonwealth v. Passmore*, 1 S. & R. (Pa.) 217;

sance although not strictly an obstruction.³⁶ The existence of the highway must be shown³⁷ where the indictment is for obstructing a highway, but, if this is properly shown, it matters not how the highway was established.³⁸ As to evidence competent and sufficient to show the existence of a highway reference is made to the authorities cited below.³⁹ Each day's continuance, as a rule, is an indictable offense, and a prescriptive right to maintain it cannot be acquired and used as a defense to a public prosecution.⁴⁰ Neither is it a good defense for the defendant to show that he had opened a new way for the public over his own land.⁴¹ But as far as the public

Commonwealth v. Ruggles, 6 Allen (Mass.) 588; *People v. Horton*, 64 N. Y. 610; *Rex v. Russell*, 6 East 427; 1 Hawkins P. C., chap. 76, § 49; *People v. Cunningham*, 1 Denio (N. Y.) 524, 43 Am. Dec. 709; *Rex v. Cross*, 3 Campb. 224; *State v. Edens*, 85 N. Car. 522, 526; 1 Am. St. 840-844, note.

³⁶ See, *Elliott Roads & Streets* (2nd ed.), §§ 649, 650, and illustrative cases there cited.

³⁷ *Whaley v. Wilson*, 120 Ala. 502, 24 So. 855; *State v. Trove*, 1 Ind. App. 553, 27 N. E. 878; *People v. Jackson*, 7 Mich. 432, 74 Am. Dec. 729; *State v. Cunningham*, 61 Mo. App. 188; *State v. Lucas*, 124 N. Car. 804, 32 S. E. 553. It seems that it must generally be shown to have been actually opened to some extent at least. *State v. Shinkle*, 40 Iowa 131; *State v. Babcock*, 42 Wis. 138; *State v. Kendall*, 54 S. Car. 192, 32 S. E. 300; *Southerland v. Jackson*, 30 Me. 462, 50 Am. Dec. 633; *Bailey v. Commonwealth*, 78 Va. 19; *Kennedy v. State*, (Tex. Cr. App.) 40 S. W. 590. But it may be doubted as to whether this is true in all cases. See, *Commonwealth v. McNaugher*, 131 Pa. St. 55, 18 Atl. 934; *Morgan v. Monmouth &c. Road Co.*, 26 N. J. L. 99; *Seeger v. Mueller*, 28 Ill. App. 28; see also, *Elliott Roads & Streets* (2nd ed.), §§ 662, 663.

³⁸ *Howard v. State*, 47 Ark. 431; *State v. Teeters*, 97 Iowa 458, 66 N. W. 754; *Zimmerman v. State*, 4 Ind. App. 583, 31 N. E. 55.

³⁹ *Commonwealth v. Abney*, 4 T. B. Mon. (Ky.) 477; *Sage v. Barnes*, 9 Johns (N. Y. 365; *Arnold v. Flattery*, 5 Ohio 271; *Plummer v. Ossipee*, 59 N. H. 55; *Hampson v. Taylor*, 15 R. I. 83; *Schafer v. Mayor*, 154 N. Y. 466, 48 N. E. 749; and compare, *Stone v. Langworthy*, 20 R. I. 602, 40 Atl. 832; *Hoffman v. Port Huron*, 110 Mich. 616, 68 N. W. 546; for evidence held insufficient, see, *Snellhouse v. State*, 110 Ind. 509, 11 N. E. 484.

⁴⁰ *Commonwealth v. Upton*, 6 Gray (Mass.) 473; *Taylor v. People*, 6 Park. Cr. Cas. (N. Y.) 347; *Rex v. Cross*, 3 Campb. 224, 227; *Queen v. Brewster*, 8 U. C. C. P. 208; *Elliott Roads & Streets* (2nd ed.), § 659, and numerous authorities cited; *Pettit v. Grand Junction*, 119 Iowa 352, 93 N. W. 381.

⁴¹ *Commonwealth v. Belding*, 13 Metc. (Mass.) 10; *State v. Harden*, 11 S. Car. 360; *Weathered v. Bray*, 7 Ind. 706. Nor that he owns the fee. *State v. Walters*, 69 Mo. 463; *Montgomery v. Parker*, 114 Ala. 118, 21 So. 452; *Langsdale v. Bonton*, 12 Ind. 467. Nor that there are other obstructions or that it is the custom of the neighborhood. *Commonwealth*

prosecution is concerned, if the act is one that has been authorized by the legislature, this will constitute a defense so long as the defendant keeps within the law, even though the act might otherwise constitute a public nuisance;⁴² yet proof of a license to maintain a temporary obstruction is no defense to a prosecution for maintaining a permanent obstruction where the maintenance of a permanent obstruction is shown.⁴³

§ 3067. Obstructing or polluting waters.—An unlawful obstruction placed in a navigable stream is a public nuisance, remediable by indictment against the party or parties who have caused the obstruction to be placed in the stream.⁴⁴ Such a nuisance may also be abated in a proper case, and “in cases where the remedy by indictment appears to be inadequate, that is to say, if there appears to be imminent danger of irreparable mischief to the public right of navigation before the tardiness of the law can afford relief, equity may interpose and abate the nuisance upon a bill for an injunction filed by the attorney-general.”⁴⁵ It has been held that if the defendant relies upon a statutory license to obstruct the stream, he must prove compliance with every requirement thereof.⁴⁶ Here, as elsewhere, the

v. Northern Cent. R. Co., 7 Pa. Sup. Ct. 234; *Henline v. People*, 81 Ill. 269; *Robinson v. State*, (Tex. Cr. App.) 44 S. W. 509; see also, *McCloughry v. Finney*, 37 La. Ann. 27, 31; *Judd v. Fargo*, 107 Mass. 264; *Bateman v. Burge*, 6 Car. & P. 391, 25 E. C. L. 490; but see, *Hamilton v. State*, 106 Ind. 361, 7 N. E. 9.

⁴² *Elliott Roads and Streets*, (2nd ed.), § 651, and authorities cited. Other authorities are cited in Vol. III, chap. 116, on Nuisance.

⁴³ *State v. Berdetta*, 73 Ind. 185.

⁴⁴ *People v. Vanderbilt*, 26 N. Y. 287; *Commonwealth v. Church*, 1 Pa. St. 105, 44 Am. Dec. 112; *Dugan v. Bridge Co.*, 27 Pa. St. 303, 67 Am. Dec. 464; *Allegheny Co. v. Zimmerman*, 95 Pa. St. 287, 40 Am. R. 649; *Sigler v. State*, 7 Baxt. (Tenn.) 493; *Rex v. Russell*, 6 B. & C. 566; *Rex v. Ward*, 4 Ad. & El. 384; *Rex v. Grosvenor*, 2 Stark. 448; *Rex v. Tin-*

dall, 6 Ad. & El. 143; *Reg. v. Betts*, 16 Q. B. 1022, 71 E. C. L. 1022; *Reg. v. Randall*, Car. & M. 496; *Gould Waters*, § 121.

⁴⁵ 57 Am. St. 694, note; *Yolo County v. Sacramento*, 36 Cal. 193; *Rowe v. Granite Bridge Co.*, 21 Pick. (Mass.) 344; *Mayor &c. v. Alexandria Canal Co.*, 12 Pet. (U. S.) 91; *Attorney-General v. Cohoes Co.*, 6 Paige (N. Y.) 133, 29 Am. Dec. 755; *Attorney-General v. Jamaica Pond &c. Co.*, 133 Mass. 361; *Attorney-General v. New Jersey R. Co.*, 3 N. J. Eq. 136; *Thompson v. Paterson &c. R. Co.*, 9 N. J. Eq. 526; *Allen v. Board of Chosen Freeholders*, 13 N. J. Eq. 68; *Attorney-General v. Delaware &c. R. Co.*, 27 N. J. Eq. 1.

⁴⁶ *Commonwealth v. Church*, 1 Pa. St. 105, 44 Am. Dec. 112; *State v. Freeport*, 43 Me 198; *State v. Parrott*, 71 N. Car. 311; see also, *State v. Wheeler*, 44 N. J. L. 88.

general rule is that the court will not balance against the offense the benefit to any part of the public that might be derived from the nuisance, and even though such benefit might outweigh the public inconvenience caused by the obstruction it would constitute no defense to an indictment therefor.⁴⁷ A wreck,⁴⁸ or a mere temporary obstruction⁴⁹ may not, however, be a nuisance. There are statutes in many of the states prohibiting the pollution of streams and other waters,⁵⁰ and even at common law the pollution of certain streams and waters so as to destroy the fish or injuriously affect the public health or the like was a public nuisance.⁵¹ But it has been held that, in the absence of any statute upon the subject, it must be shown that the stream was a public one or the public in some way injuriously affected.⁵²

§ 3068. Public indecency.—Lewd and lascivious conduct, exposure of the person, obscenity, and the like, in public, were indictable offenses at common law,⁵³ and generally constituted public nuisances, but statutes in many states have added to or enlarged the scope of the common law upon the subject of public indecency.⁵⁴ In an old case it is said that the term public indecency has no fixed legal mean-

⁴⁷ *Rex v. Ward*, 4 Ad. & El. 384, 31 E. C. L. 180; *Rex v. Grosvenor*, 2 Stark. 448; *Gold v. Carter*, 9 Humph. (Tenn.) 369, 49 Am. Dec. 712; *People v. St. Louis*, 10 Ill. 351, 48 Am. Dec. 339; *Respublica v. Caldwell*, 1 Dall. (U. S.) 150; 1 Wood Nuisance, §§ 478, 479.

⁴⁸ See, *Rex v. Watts*, 2 Esp. 675; *Snark, The*, L. R. (1900), P. Div. 105, 82 L. T. N. S. 42; 21 Am. & Eng. Ency. of Law, 443.

⁴⁹ *State v. Charleston &c. Co.*, 68 S. Car. 540, 47 S. E. 979; *People v. Horton*, 64 N. Y. 610, aff'g 5 Hun (N. Y.) 516; see also, *Rex v. Tindall*, 6 Ad. & El. 143, 33 E. C. L. 96.

⁵⁰ *State v. Griffin*, 69 N. H. 1, 39 Atl. 260, 41 L. R. A. 177, and note citing authorities. See also, 12 L. R. A. 577, 84 Am. St. 916, as to injunction and damages for pollution and as to the rights and liabilities

of municipalities for casting sewage and the like into streams.

⁵¹ *Garrett Nuisance* (2nd ed.) 111, 112, 113; *Commonwealth v. Soulas*, 16 Phila. (Pa.) 523, 525; *Rex v. Medley*, 6 Car. & P. 292, 25 E. C. L. 439; *State v. Taylor*, 29 Ind. 517; *Board &c. v. Casey*, 3 N. Y. S. 399; *State v. Wahl*, 35 Kans. 608, 11 Pac. 911.

⁵² *Messersmidt v. People*, 46 Mich. 437, 9 N. W. 485.

⁵³ See, 4 *Blackstone Comm.* 64; *Knowles v. State*, 3 Day (Conn.) 103; *State v. Appling*, 25 Mo. 315, 69 Am. Dec. 469; *Bell v. State*, 1 Swan (Tenn.) 42; *Grisham v. State*, 2 Yerg. (Tenn.) 589; *Rex v. Wilkes*, 4 Burr. 2527; *Dugdale v. Reg., Dears. C. C.* 64; *Rex v. Sedley*, 17 How. St. Tr. 155, note.

⁵⁴ See, *United States v. Males*, 51 Fed. 41; *Commonwealth v. Wardell*, 128 Mass. 52; *Fuller v. People*, 92 Ill. 182.

ing and is usually limited by the courts to public displays of the naked person, the publication, sale, or exhibition of obscene books and prints, or the exhibition of a monster—acts which have a direct bearing on public morals, and affect the body of society, and that even under a statute against “notorious lewdness or other public indecency,” a prosecution will not lie for using obscene language or singing obscene songs.⁵⁵ Under most of the statutes, as at common law, the offensive act of lewdness must be public and is generally required to be open and notorious,⁵⁶ but a private sale or exhibition of obscene pictures or prints has been held a sufficient publication.⁵⁷ And it seems that under the later decisions, the place in which the person is exposed need not be public if more than one person saw or was in a situation to see it.⁵⁸ Circumstantial as well as direct evidence is competent,⁵⁹ but mere hearsay evidence is not.⁶⁰ Knowledge or intent may be inferred from circumstances and is sometimes presumed regardless of the actual motive.⁶¹ But the question of intent and various other questions that usually arise are generally for the jury to determine.⁶²

⁵⁵ *McJunkins v. State*, 10 Ind. 140.

⁵⁶ *Crouse v. State*, 16 Ark. 566; *People v. Gates*, 46 Cal. 52; *Brooks v. State*, 2 Yerg. (Tenn.) 482; *Commonwealth v. Munson*, 127 Mass. 459; *Searls v. People*, 13 Ill. 597; *State v. Marvin*, 12 Iowa 499.

⁵⁷ *Reg. v. Carlile*, 1 Cox Cr. Cas. 229; *Commonwealth v. Sharpless*, 2 S. & R. (Pa.) 91, 7 Am. Dec. 632.

⁵⁸ *Reg. v. Wellard*, L. R. 14 Q. B. D. 63, 54 L. J. M. C. 14, 15 Cox Cr. Cas. 559; *Reg. v. Farrell*, 9 Cox Cr. Cas. 446; *State v. Hazle*, 20 Ark. 156; *Commonwealth v. Wardell*, 128 Mass. 52, 35 Am. R. 357; but see, *Commonwealth v. Hardin*, 2 Ky. L. R. 59; *Reg. v. Thallman*, 9 Cox Cr. Cas. 388. Much, however, depends upon the particular statute. As to what is a public place, see, *Reg. v. Harris*, L. R., 1 C. C. 282, 11 Cox Cr. Cas. 659; *Van Houten v. State*, 46 N. J. L. 16, 50 Am. R. 397; *Reg. v. Wellard*, L. R., 14 Q. B. 63, 15 Cox

Cr. Cas. 559; *Reg. v. Holmes*, 6 Cox Cr. Cas. 216; *Moffit v. State*, 43 Tex. 346; *Lorimer v. State*, 76 Ind. 495.

⁵⁹ *Commonwealth v. Dill*, 156 Mass. 226, 30 N. E. 1016; *Peak v. State*, 10 Humph. (Tenn.) 99.

⁶⁰ *Buttram v. State*, 4 Coldw. (Tenn.) 171.

⁶¹ *Reg. v. Hicklin*, 11 Cox Cr. Cas. 19, 29; *State v. Holedger*, 15 Wash. 443, 46 Pac. 652; *United States v. Harmon*, 45 Fed. 414; *State v. McKee*, 73 Conn. 18, 46 Atl. 409; *People v. Muller*, 96 N. Y. 408, 48 Am. R. 635; *Montross v. State*, 72 Ga. 261, 53 Am. R. 840; *State v. Stice*, 88 Iowa 27, 55 N. W. 17; *Commonwealth v. Haynes*, 2 Gray (Mass.) 72, 61 Am. Dec. 437.

⁶² *Miller v. People*, 5 Barb. (N. Y.) 203; *Carter v. State*, 107 Ala. 146, 18 So. 232; *State v. Van Wye*, 136 Mo. 227, 37 S. W. 938, 58 Am. St. 627; *United States v. Smith*, 45 Fed. 476.

§ 3069. **Storing explosives.**—It has been held that the mere keeping of a large quantity of gunpowder or other explosives on one's premises, or even near a public place, does not necessarily constitute a public nuisance per se.⁶³ But it may constitute a public nuisance if the explosives are so kept and in such a place and under such circumstances as to endanger life.⁶⁴ There are comparatively few decisions upon the subject, however, in criminal cases, and nothing peculiar in the application in such cases of rules of evidence. The questions generally arise in civil actions for damages or in actions or prosecutions under municipal ordinances.⁶⁵

⁶³Kinney v. Koopman, 116 Ala. 310, 22 So. 593, 67 Am. St. 119, and note; Dumesnil v. Dupont, 18 B. Mon. (Ky.) 800, 68 Am. Dec. 750. see also, Heeg v. Licht, 80 N. Y. 579; Rudder v. Koopman, 116 Ala. 332, 22 So. 601; Wilson v. Phoenix Powder Co., 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. 890; Wier's Appeal, 74 Pa. St. 230.

⁶⁴Reg. v. Lister, 7 Cox Cr. Cas. 342; People v. Sands, 1 Johns. (N. Y.) 78, 3 Am. Dec. 296; Bradley v. People, 56 Barb. (N. Y.) 72; State v. Paggett, 8 Wash. 579, 36 Pac. 487; ⁶⁵See, 67 Am. St. 134, note; 86 Am. St. 521, note, and, 38 L. R. A. 306, note.

CHAPTER CXLVIII.

PERJURY.

Sec.	Sec.
3070. Definition—Essential elements.	3080. Materiality—Collateral matter.
3071. Burden of proof.	3081. Materiality—How shown.
3072. Presumptions.	3082. Record of former proceedings.
3073. Questions of law or fact.	3083. Best evidence.
3074. Oath and proceedings.	3084. Stenographer's notes.
3075. Jurisdiction of tribunal—Authority of officer.	3085. Parol evidence.
3076. Jurisdiction of tribunal—Recent cases.	3086. Res gestae.
3077. Falsity.	3087. Circumstantial evidence.
3078. Motive or intent.	3088. Admissions and confessions.
3079. Materiality.	3089. Corroboration.
	3090. Defenses.
	3091. Variance.

§ 3070. Definition—Essential elements.—Perjury, except where the statute otherwise expressly or impliedly defines it, may be defined as a corrupt, wilful and false oath taken in a judicial proceeding, before some court or officer having authority to administer oaths, concerning a material matter involved in the proceedings.¹ To maintain a prosecution for perjury, it is said, it must appear that the oath was false, the intention wilful, the proceedings judicial, the party lawfully sworn, the assertion absolute, and the falsehood material to the matter in question.² The statutes of many of the states provide that one may be prosecuted for perjury who takes a lawful oath or affirmation in any matter in which, by law, an oath or affirmation may be required and who, upon such oath or affirmation, swears or affirms wilfully, corruptly, and falsely touching a matter material

¹ Hood v. State, 44 Ala. 81; Miller v. State, 15 Fla. 577. At common law perjury was defined as the "taking of a wilful false oath by one who being lawfully sworn by a competent court to depose the truth in any judicial proceeding, swears absolutely and falsely, in a matter ma-

terial to the point in issue, whether he believed it or not." Commonwealth v. Powell, 2 Metc. (Ky.) 10; see also, 1 Hawkins P. C., chap. 69, § 1; 2 Russell Crimes (5th Am. ed.) 596; 4 Blackstone Comm. 137.

² Commonwealth v. Kuntz, 4 Pa. L. J. 163.

to the point in question.³ In some jurisdictions false swearing, where it would not be perjury, is also made a crime, but it has been held that where it is made a separate and distinct crime by statute, the prosecution must be based upon such statute.⁴ Modern statutes in many of the states have, as above stated, enlarged the common-law offense of perjury, and it is impossible to give an exact definition and statement of the essential elements under every statute, yet the different statutes bear, in most respects, a close resemblance. The definition and statement of the essential elements given by Mr. Hughes will be found to be applicable in most jurisdictions, and we can not do better than to quote from his work as follows:⁵ "Perjury consists in wilfully and falsely swearing to a fact material to the point in issue before a court or tribunal having legal authority to inquire into the cause or matter investigated.⁶ To sustain a charge of perjury the evidence must prove the following essential elements: (1) The authority of the officer to administer the oath; (2) the occasion of administering it; (3) the taking of the oath by the accused; (4) the substance of the oath; (5) the material matter sworn to; (6) the introductory averments; (7) the falsity of the matter sworn to; and (8) the corrupt intention of the accused.⁷ To commit a perjury a person must wilfully, corruptly and falsely, swear or affirm. The false assertion made by the witness under oath must be known to such witness to be false and must be intended by him or her to mislead the court or jury."⁸

³ See, for instance, Burns' Ann. Ind. Stat., § 2093; *State v. Smith*, 63 Vt. 201, 22 Atl. 604; R. L. Vt., § 4263; *Langford v. State*, 9 Tex. App. 283; see, Act Cong. March 3, 1857, § 5 (11 Stat. 250).

⁴ *State v. Runyan*, 130 Ind. 208, 29 N. E. 779; see also, *Commonwealth v. Maynard*, 91 Ky. 131, 15 S. W. 52; *State v. Carpenter*, 164 Mo. 588, 65 S. W. 255; *Steber v. State*, 23 Tex. App. 176, 4 S. W. 880.

⁵ Hughes Cr. Law & Proc., § 1582.

⁶ 4 Blackstone Comm. 137; *Pankey v. People*, 1 Scam. (Ill.) 80; *State v. Hunt*, 137 Ind. 537, 37 N. E. 409; see, *State v. Houston*, 103 N. Car. 383, 9 S. E. 699, 8 Am. Cr. R. 631,

note; *State v. Mace*, 76 Me. 64, 5 Am. Cr. R. 588; *Hood v. State*, 44 Ala. 81, 86; see also, 85 Am. Dec. 488, note.

⁷ 2 Roscoe Cr. Ev., 836, 1045.

⁸ *Coyne v. People*, 124 Ill. 24, 14 N. E. 668, 7 Am. St. 324; *Johnson v. People*, 94 Ill. 505; *People v. German*, 110 Mich. 244, 68 N. W. 150; see, *State v. Higgins*, 124 Mo. 640, 28 S. W. 178; *People v. Ross*, 103 Cal. 425, 37 Pac. 379; *Bell v. Senneff*, 83 Ill. 122; *People v. Willey*, 2 Park. Cr. Cas. (N. Y.) 19; *Thomas v. State*, 71 Ga. 252; *State v. Cruikshank*, 6 Blackf. (Ind.) 62; *Miller v. State*, 15 Fla. 577; *Green v. State*, 41 Ala. 419; *Williams v. Common-*

§ 3071. **Burden of proof.**—The burden is upon the prosecution to establish the defendant's guilt beyond a reasonable doubt.⁹ In order to do this it is necessary, in general, to prove the essential elements of the crime as enumerated in the last preceding section. Thus, it has been held that the burden rests upon the state in a prosecution for perjury to show that the oath was false,¹⁰ the intention wilful,¹¹ the proceedings judicial,¹² the party lawfully sworn,¹³ the assertion absolute¹⁴ and the falsehood material to the matter in question.¹⁵ The burden is upon the state, however, to prove only so much of the testimony of the witness false as relates to the particular material fact on which the perjury is assigned,^{15*} but under no circumstances, it is said, will the materiality be presumed.¹⁶ It has been held that when the prosecution has shown a material part of the defendant's statement under oath to be false, a *prima facie* case is established, and the burden of proof rests upon the defendant to show that his false oath was occasioned by surprise, inadvertency, or mistake, and was not made through a corrupt motive.¹⁷ But where the defendant is unable to read or write, in a prosecution for perjury for signing a false affidavit, the state must first show that the defendant had

wealth, 91 Pa. St. 493; Davidson v. State, 22 Tex. App. 372, 3 S. W. 662; 1 Hawkins P. C. 429, § 2.

⁹Galloway v. State, 29 Ind. 442; People v. German, 110 Mich. 244, 68 N. W. 150; State v. Fannon, 158 Mo. 149, 59 S. W. 75; Rex v. De Beauvoir, 7 Car. & P. 17, 32 E. C. L. 477.

¹⁰Heflin v. State, 88 Ga. 151, 14 S. E. 112, 30 Am. St. 147; Commonwealth v. Kuntz, 4 Pa. L. J. 163; State v. Chamberlin, 30 Vt. 559; Anderson v. State, 24 Tex. App. 705, 7 S. W. 40; Littlefield v. State, 24 Tex. App. 167, 5 S. W. 650.

¹¹Mason v. State, 55 Ark. 529, 18 S. W. 827; Foster v. State, 32 Tex. Cr. App. 39, 22 S. W. 21; People v. Macard, 109 Mich. 623, 67 N. W. 968.

¹²King v. State, 32 Tex. Cr. App. 463, 24 S. W. 514; Keator v. People, 32 Mich. 484.

¹³Sloan v. State, 71 Miss. 459, 14 So. 262; Dempsey v. People, 20 Hun

(N. Y.) 261; State v. Mace, 86 N. Car. 668.

¹⁴Mason v. State, 55 Ark. 529, 18 S. W. 827; Commonwealth v. Kuntz, 4 Pa. L. J. 163.

¹⁵State v. Aikens, 32 Iowa 403; Nelson v. State, 32 Ark. 192; Lawrence v. State, 2 Tex. App. 479; Rich v. United States, 1 Okla. 354, 33 Pac. 804.

^{15*}United States v. Erskine, 4 Cranch (U. S.) 299, 25 Fed. Cas. No. 15057; Dodge v. State, 24 N. J. L. 455; Hutcherson v. State, 33 Tex. Cr. App. 67, 24 S. W. 908; 1 Bishop Cr. Proc., § 934.

¹⁶Nelson v. State, 32 Ark. 192; that the materiality must be shown, see also, Commonwealth v. Pollard, 12 Metc. (Mass.) 225; State v. Aikens, 32 Iowa 403; Wood v. People, 59 N. Y. 117; Garrett v. State, 37 Tex. Cr. App. 198, 38 S. W. 1017.

¹⁷State v. Chamberlin, 30 Vt. 559.

an understanding of the statement contained in the affidavit.¹⁸ Making a mark at the end of an affidavit after it is read to affiant where the affidavit contains a preface and conclusion, both stating that it is sworn to, and where the officer signing the jurat says to the affiant, "if you swear to this statement put your mark here," has been held to be an oath sufficient on which to assign perjury.¹⁹

§ 3072. Presumptions.—Where it is affirmatively shown in a prosecution for perjury that an oath was administered in open court by an acting officer of the class having authority to administer such oaths, the presumption is that it was rightfully done,²⁰ but in the absence of any evidence by the prosecution, there is no presumption that an oath was administered or that it was correctly done.²¹ There is no legal presumption in favor of the prosecution that the false statement was material,²² but on the other hand, this must be affirmatively established by the state.²³ And it may, perhaps, be said that no presumption favors the prosecution as to any of the allegations necessarily alleged, for they must be affirmatively proved by the state.²⁴ That is, the state must at least produce some evidence upon the subject.

§ 3073. Questions of law or fact.—Questions of fact are for the jury in perjury cases as in other criminal cases. But the question as to whether the alleged false testimony or oath upon which perjury is assigned is material within the rule in regard to perjury is generally held to be a question for the court.²⁵ So, the question as

¹⁸ *Hernandez v. State*, 18 Tex. App. 134, 51 Am. R. 295.

¹⁹ *United States v. Mallard*, 40 Fed. 151, 5 L. R. A. 816.

²⁰ *State v. Mace*, 86 N. Car. 668; *State v. Hascall*, 6 N. H. 352; *Staight v. State*, 39 Ohio St. 496; *Reg. v. Roberts*, 38 L. T. N. S. 690.

²¹ *Sloan v. State*, 71 Miss. 459, 14 So. 262.

²² *Nelson v. State*, 32 Ark. 192.

²³ *Commonwealth v. Kuntz*, 4 Pa. L. J. 163; *State v. Chamberlin*, 30 Vt. 559; *State v. Aikens*, 32 Iowa 403.

²⁴ *Commonwealth v. Kuntz*, 4 Pa. L. J. 163; *State v. Chamberlin*, 30

Vt. 559; *Sloan v. State*, 71 Miss. 459, 14 So. 262.

²⁵ *State v. Clough*, 111 Iowa 714, 83 N. W. 727; *State v. Caywood*, 96 Iowa 367, 65 N. W. 385; *State v. Swafford*, 98 Iowa 362, 67 N. W. 284; *Gordon v. State*, 48 N. J. L. 611, 7 Atl. 476; *United States v. Singleton*, 54 Fed. 488; *State v. Faulkner*, 175 Mo. 546, 75 S. W. 116; *State v. Williams*, 30 Mo. 364; *Peters v. United States*, 2 Okla. 138, 37 Pac. 1081; *People v. Lem You*, 97 Cal. 224, 32 Pac. 11; *Hanscom v. State*, 93 Wis. 273, 67 N. W. 419; *State v. Park*, 57 Kans. 431, 46 Pac. 713; *Davidson v. State*, 22 Tex. App. 372, 3 S. W. 662.

to the jurisdiction of the court in the proceeding in which the oath was taken has been held to be a question for the court.²⁶ But, in a few jurisdictions, as elsewhere shown, juries are made the judges of both law and fact, and in such a jurisdiction it has been held that the defendant in a prosecution for perjury has a right to have the question of the materiality of the alleged false testimony submitted to the jury.²⁷

§ 3074. Oath and proceedings.—It is said that to make a valid oath, for the falsity of which perjury will lie, there must be in some form, in the presence of an officer authorized to administer it, an unequivocal and present act by which the affiant consciously takes upon himself the obligation of an oath.²⁸ But if no particular form is prescribed, the form is not a vital matter, where the oath is solemnly administered,²⁹ and, if a form is prescribed, a substantial compliance is sufficient.³⁰ A mere voluntary oath, not administered in the course of justice, is generally insufficient,³¹ but it is not now usually required, as at common law, to be in a judicial proceeding. It has been held that perjury may be predicated on false testimony, although the witness was incompetent,³² and that an affidavit initiating a criminal

But it is said that it may become a mixed question of law and fact; *Young v. People*, 134 Ill. 37, 24 N. E. 1070; *McAvoy v. State*, 39 Tex. Cr. App. 684, 47 S. W. 1000.

²⁶ *State v. Clough*, 11 Iowa 714, 83 N. W. 727; in, *State v. Hopper*, 133 Ind. 460, 32 N. E. 878; *Masterson v. State*, 144 Ind. 240, 43 N. E. 138. it is held that the court should take judicial notice of the authority of the officer to administer oaths upon proof of facts showing that he is an officer upon whom the statute confers such authority.

²⁷ *State v. Spencer*, 45 La. Ann. 1, 12 So. 135.

²⁸ *O'Reilly v. People*, 86 N. Y. 154, 40 Am. R. 525; *Markey v. State*, (Fla.) 37 So. 53.

²⁹ See, *State v. Keene*, 26 Me. 33; 2 Wharton Cr. Law, § 1251; 2 Bishop Cr. Law, § 1018. Or if the affiant

professes such forms to be binding upon his conscience. *Markey v. State*, (Fla.) 37 So. 53.

³⁰ *State v. Dayton*, 23 N. J. L. 49, 53 Am. Dec. 270; *State v. Gates*, 17 N. H. 373; *Sharp v. Wilhite*, 2 Humph. (Tenn.) 434; *Commonwealth v. Smith*, 11 Allen (Mass.) 243; *State v. Owen*, 72 N. Car. 605; *State v. Green*, 24 Ark. 591.

³¹ See, *People v. Travis*, 4 Park. Cr. Cas. (N. Y.) 213; *Silver v. State*, 17 Ohio 365; *Lamden v. State*, 5 Humph. (Tenn.) 83; *Linn v. Commonwealth*, 96 Pa. St. 285; *Heintz v. Union Quarter Sessions*, 45 N. J. L. 523; *Rex v. Cohen*, 1 Stark. 416; *Reg. v. Bishop*, Car. & M. 302; *United States v. Babcock*, 4 McLean (U. S.) 113.

³² *State v. Moore*, 111 La. Ann. 1006, 36 So. 100; see also, *Horn v. Foster*, 19 Ark. 346, 354; *Montgom-*

prosecution is a sufficient predicate for perjury.³³ So, where a proper case for impeaching a witness by showing contradictory statements was presented, it was held that such witness was guilty of perjury if he swore as to whether he did or did not make such contradictory statements.³⁴ Many other illustrative cases are given in the notes referred to below.³⁵ In a recent Florida case it is held that the officer alleged to have administered the oath, or defendant himself, or any witness present at such alleged swearing may be examined fully as to the facts connected therewith that it may be determined whether defendant was sworn and that the identification and production of the testimony of defendant on trial for perjury, who was complainant in a divorce suit, with proof of the signature of the defendant and of the officer taking the testimony, is *prima facie* sufficient to establish that defendant was actually sworn, and conclusive unless the presumption is overcome by other testimony.³⁶ So, in a Kansas case it is held that the complaint filed and the warrant served in the action in which the false testimony was given are competent and admissible to prove the pendency of the proceedings to which they relate.³⁷ And in a Georgia case, where it appeared that accused had sworn to a report of several pages, one of such pages was held not to be inadmissible because the accused had previously sworn to it before another attesting officer.³⁸

§ 3075. Jurisdiction of tribunal—Authority of officer.—It is essential that the oath should be taken before an officer having authority

ery v. State, 10 Ohio 220; State v. Hawkins, 115 N. Car. 712, 20 S. E. 623; but compare, Smith v. Boucher, 2 Str. 993.

³³ Simpson v. State, (Tex. Cr. App.) 79 S. W. 530.

³⁴ Brown v. State, (Fla.) 36 So. 705.

³⁵ 85 Am. Dec. 491, note; 54 L. R. A. 520, note. Cases in which it was held that the tribunal, proceeding or oath was not such as perjury could be predicated upon are reviewed as well as those in which it was held that perjury would lie.

³⁶ Markey v. State, (Fla.) 37 So. 53. It was also held in the same

case that where the affidavit or testimony of a witness was actually used by him in the cause in which it was taken, proof of this fact will obviate the necessity of proving his handwriting on trial for perjury, but will not dispense with proof that he was sworn. See also, Rex v. James, 1 Show. 397, Carth. 220; State v. Madigan, 57 Minn. 425, 59 N. W. 490; Rex v. Morris, 2 Burr. 1189; Rex v. Benson, 2 Campb. 508.

³⁷ State v. Horine, (Kans.) 78 Pac. 411.

³⁸ Thompson v. State, 120 Ga. 132, 47 S. E. 566.

to administer it, or, if in judicial proceedings in court, that the court should have jurisdiction.³⁹ But there is some conflict among the authorities as to what is or is not sufficient to show or constitute the necessary authority or jurisdiction, and mere slight irregularities, or even want of jurisdiction, in a sense, to render the final judgment rendered by the court, will not necessarily prevent one who swears falsely from being found guilty of perjury. A recent writer after reviewing the authorities upon the subject, makes the following statement: "The authorities thus reviewed seem to establish that want of jurisdiction to inquire into a matter at all is fatal to a charge of perjury, and this is true, at least at common law, even if the court had general jurisdiction of the subject-matter but the jurisdiction had not attached in the particular case. In this connection, however, it is important to bear in mind that defects which in some cases, and under some circumstances, are deemed to deprive the court of jurisdiction of the particular proceeding, in other cases and under other circumstances are regarded as mere irregularities that they may be waived. So, also, it is to be observed that, though the court may not, under the circumstances as developed in a particular case, have had jurisdiction to proceed to judgment, yet it may have had jurisdiction to take cognizance of the case in the first instance. So, also, a distinction has been made between a case where there was no jurisdiction and a case where the jurisdiction might have been, but was not, defeated by proof of extrinsic circumstances."⁴⁰ In a recent case it is held that perjury would lie although the officer or magistrate before whom the proceedings were had was only an officer de facto.⁴¹ So, it is generally sufficient prima facie to show that the officer or magistrate was regularly acting as such.⁴²

³⁹ 85 Am. Dec. 490, note; 54 L. R. A. 513, note. In both of these notes numerous authorities are reviewed, and reference will here be made to only a few of them. *Paine's Case*, Yel. 111; *Rex v. Verelst*, 3 Campb. 433; *Reg. v. Pearce*, 9 Cox Cr. Cas. 258; *Reg. v. Hughes*, 7 Cox Cr. Cas. 286; *Muir v. State*, 8 Blackf. (Ind.) 154; *State v. Phippen*, 62 Iowa 54, 17 N. W. 146; *State v. Gates*, 107 N. Car. 832, 12 S. E. 319; *Butler v. State*, 36 Tex. Cr. App. 483, 38 S. W. 787; *State v. McCone*, 59 Vt. 117, 7

Atl. 406; *United States v. Curtis*, 107 U. S. 671.

⁴⁰ *Morford v. Territory*, 10 Okla. 741, 63 Pac. 958, 54 L. R. A. 513, 521, note.

⁴¹ *Morford v. Territory*, 10 Okla. 741, 63 Pac. 958, 54 L. R. A. 513; but see, *Biggerstaff v. Commonwealth*, 11 Bush (Ky.) 169; *Lambert v. People*, 76 N. Y. 220.

⁴² *State v. Hascall*, 6 N. H. 352; *Masterson v. State*, 144 Ind. 240, 43 N. E. 138; *Keator v. People*, 32 Mich. 484; *Staight v. State*, 39 Ohio

Thus, evidence that the oath was administered in open court by one acting as deputy clerk has been held sufficient proof of official authority to administer oaths.⁴³ So, it has been held that in a prosecution for perjury for making a false affidavit the production of the affidavit, with proof that the defendant signed it, the officer having properly affixed his seal and jurat, is sufficient evidence that the defendant actually swore to the affidavit,⁴⁴ and that a witness may testify that he had authority to administer oaths and having such authority that he administered the oath.⁴⁵

§ 3076. Jurisdiction of tribunal—Recent cases.—The subject treated in the last preceding section has been under consideration in several recent cases, in addition to those cited, and it may be well to review a few of them. In a Texas case it was said that while perjury cannot be predicated on an oath administered in proceedings wholly void, yet mere irregularities or informalities not ousting the jurisdiction of the court constitute no defense to a charge of perjury. And it has been held that where parties to a civil action expressly agreed in writing to waive notice, time, and issuance of commission to take a deposition of the plaintiff therein as evidence on the trial, and agreed that the answers to the interrogatories might be taken on the original and cross interrogatories before any officer authorized by law to take the same in the county where plaintiff might be found, a notary public of the county where plaintiff was found was authorized to take his deposition, making the deposition legal, and plaintiff guilty of perjury on giving false answers to such interrogatories.⁴⁶ So, in a recent case in Florida, it is held that although a tribunal must have jurisdiction before perjury can be committed by making a false oath before it, yet where there is a defect which renders the proceeding voidable only, and such proceeding

St. 496; Reg. v. Roberts, 38 L. T. 59 N. W. 490; State v. Hascall, 6 N. N. S. 690; see also, Warwick v. H. 352; but see, Morrell v. People, State, 25 Ohio St. 21; Stephens v. 32 Ill. 499, 502; State v. Theriot, 50 State, 1 Swan (Tenn.) 157; State v. La. Ann. 1187, 24 So. 179; United Mace, 86 N. Car. 668; State v. Greer, States v. Garcelon, 82 Fed. 611. 48 Kans. 752, 30 Pac. 236.

⁴³ Keator v. People, 32 Mich. 484; 153, 6 S. W. 184; State v. Hascall, King v. State, 32 Tex. Cr. App. 463, 6 N. H. 352; Moore v. State, 52 Ala. 24 S. W. 514; Masterson v. State, 144 424. Ind. 240, 43 N. E. 138.

⁴⁴ Manning v. State, (Tex. Cr. App.) 81 S. W. 957.

⁴⁵ State v. Madigan, 57 Minn. 425,

is amendable or the defects are waived, perjury may be committed; and that mere irregularities in the appointment of a person to take testimony cannot be questioned on the trial for perjury of one who testified falsely before him. Applying these principles to the case before it, the court held that where, on motion of the complainant in a proceeding for divorce, the court appoints a certain attorney to take testimony, but fails to designate him by any official title, the order confers authority on him to take the testimony and to administer oaths to complainant and other witnesses, and that where a bill for divorce contained allegations giving the court jurisdiction and warranting the relief sought, if true, the fact that, on the trial of complainant for perjury in testifying as to material facts, it appeared that neither party had resided in the state for the statutory period, would not prevent a conviction.⁴⁷ And in another recent case it is held that one may be convicted of false swearing although the officer who administered the oath knew at the time that it was false, and was made to obtain funds to which the affiant was not entitled, and although such officer administered the oath for the purpose of instituting criminal proceedings.⁴⁸

§ 3077. **Falsity.**—Proper evidence is, of course, admissible to show the falsity of the statement in the former proceedings as this is an essential ground upon which the proceeding must stand or fall.⁴⁹ Circumstantial evidence is admissible upon this question,⁵⁰ and contradictory statements and facts which show the falsity of the oath upon which perjury is assigned are usually relevant and admissible.⁵¹ Thus, it is held that the state may show the falsity of the defendant's statements regarding other and correlative facts as tending to prove

⁴⁷ *Markey v. State*, (Fla.) 37 So. 109 Mich. 623, 67 N. W. 968; *State v. Smith*, 119 N. Car. 856, 25 S. E. 53.

⁴⁸ *Thompson v. State*, 120 Ga. 132, 47 S. E. 566.

⁴⁹ *Heflin v. State*, 88 Ga. 151, 14 S. E. 112, 30 Am. St. 147; *Adams v. State*, 93 Ga. 166, 18 S. E. 553; *Littlefield v. State*, 24 Tex. App. 167, 5 S. W. 650. "Any fact," says Mr. Underhill, "is relevant which tends to prove or disprove either its truth or falsity." *Underhill Cr. Ev.*, § 469; see also, *Walker v. State*, 107 Ala. 5, 18 So. 393; *People v. Macard*, 109 Mich. 623, 67 N. W. 968; *State v. Faulk*, 30 La. Ann. 831; *Elghmy v. People*, 79 N. Y. 546; but see, *Hemphill v. State*, 71 Miss. 877, 16 So. 261.

⁵⁰ *State v. Swafford*, 98 Iowa 362, 67 N. W. 284; *State v. Faulk*, 30 La. Ann. 831; *Elghmy v. People*, 79 N. Y. 546; but see, *Hemphill v. State*, 71 Miss. 877, 16 So. 261.

⁵¹ *Brown v. State*, 57 Miss. 424; *State v. Faulk*, 30 La. Ann. 831; *State v. Jones*, 91 N. Car. 629; *Cordway v. State*, 25 Tex. App. 405, 8 S. W. 670; *Mason v. State*, 55 Ark. 529, 18 S. W. 827.

the falsity of the material fact.⁵² It has also been held that a witness for the state in a case of perjury may testify as to what the defendant said in the former proceeding and may then say that it was false, and give the facts which conclusively show it to be false.⁵³

§ 3078. Motive or intent.—Evidence tending to show the motive or intent in taking the alleged false oath or giving the alleged false testimony is frequently important upon the question as to whether it was wilfully false and corrupt, and evidence has been held admissible to show animosity and malice in the defendant against the prosecutor;⁵⁴ or that he had sinister and corrupt motives in giving the false testimony. Thus, where the charge of perjury was based upon a complaint made by the defendant of threats on the part of the prosecutor to do him some great bodily harm, requiring sureties of the peace against him, it was held that evidence was admissible, which showed that the real object of the defendant, in making that complaint, was to coerce the prosecutor to pay a disputed demand.⁵⁵ And so it has been held that although the false testimony given in a cause was afterwards retracted on cross-examination, or a subsequent stage of the trial, yet the indictment will be sustained by proof that the false testimony was wilfully and corruptly given, notwithstanding the subsequent retraction.⁵⁶ “But it must be clearly shown,” says Professor Greenleaf,⁵⁷ “to have been wilfully and corruptly given, without any intention, at the time, to retract it; for it is settled, that a general answer may be subsequently explained so as to avoid the imputation of perjury. Thus, where perjury was assigned upon an answer in chancery, in which the defendant stated that she had received no money; and it was proved, that, upon exceptions being taken to this answer, she had put in a second answer, explaining the generality of the first, and stating that she had received no money before such a day,—it was held, upon a trial at bar, that nothing in the first answer could be assigned as perjury which was explained in the second.”⁵⁸ It has also been held that the evil intent of the de-

⁵² *Anderson v. State*, 24 Tex. App. 705, 7 S. W. 40.

⁵³ *Adams v. State*, 93 Ga. 166, 18 S. E. 553; *Heflin v. State*, 88 Ga. 151, 14 S. E. 112, 30 Am. St. 147.

⁵⁴ *Rex v. Munton*, 3 Car. & P. 498.

⁵⁵ *State v. Hascall*, 6 N. H. 352.

⁵⁶ *Martin v. Miller*, 4 Mo. 47; see

also, *Reg. v. Phillpotts*, 3 Car. & Kir. 135, 5 Cox Cr. Cas. 363.

⁵⁷ 3 Greenleaf Ev., § 199.

⁵⁸ *Rex v. Carr*, 1 Sid. 418, 2 Keb. 336; 2 Russell Crimes 666 (5th Eng. ed., Vol. III, 97). The same general principle is recognized in, *Rex v. Jones*, 1 Peake N. P. 38; *Rex v. Dow-*

fendant may be shown by evidence of other perjury than that alleged in the indictment, relating to the same oath and subject-matter, and this may be properly considered by the jury in determining the question of corrupt intent in swearing to the false matter upon which the defendant is charged.⁵⁹ Evidence has also been held admissible which tends to show that the accused endeavored to induce a third person to give false testimony in the case in which he gave the alleged false testimony,⁶⁰ or that the defendant charged with perjury endeavored to prevent and induce witnesses from testifying against the defendant in the case in which the false testimony was given.⁶¹ Deliberation and wilfulness, it is said, are essential elements of the crime of perjury and evidence which tends to prove such is admissible and goes to the very substance of the offense.⁶² It has also been held that a justice of the peace who conducted the preliminary examination of the case in which the perjury is alleged to have taken place, may testify as to the insolent conduct and language of the defendant while testifying before him.⁶³ And where the defendant attempts to show that his affidavit or testimony was made by mistake, inadvertence or under agitation, the prosecution may usually show that the defendant made such false statement with premeditation.⁶⁴

§ 3079. **Materiality.**—In an action for perjury there must be proof that the false testimony was material to the issue. The fact that it was false alone is not enough to convict, and false testimony will not be presumed to be material.⁶⁵ A witness will not be permitted to give it as his opinion that the evidence was material, but this is left for the tribunal.⁶⁶ The question of materiality is usually to

lin, 1 Peake N. P. 170; *Rex v. Rowley*, Ry. & M. 299.

⁵⁹ *State v. Raymond*, 20 Iowa 582.

⁶⁰ *Heflin v. State*, 88 Ga. 151, 14 S. E. 112, 30 Am. St. 147.

⁶¹ *People v. Macard*, 109 Mich. 623, 67 N. W. 968.

⁶² *Mason v. State*, 55 Ark. 529, 18 S. W. 827.

⁶³ *Foster v. State*, 32 Tex. Cr. App. 39, 22 S. W. 21.

⁶⁴ *Davidson v. State*, 22 Tex. App. 372, 3 S. W. 662; but see, *Mason v. State*, 55 Ark. 529, 18 S. W. 827.

⁶⁵ *Lawrence v. State*, 2 Tex. App. 479; *Rich v. United States*, 1 Okla. 354, 33 Pac. 804; *Wood v. People*, 59 N. Y. 117; *Nelson v. State*, 32 Ark. 192. The mere fact that the testimony was admitted has been held insufficient to show that it was material. *Commonwealth v. Pollard*, 12 Metc. (Mass.) 225; see also, *Brown v. State*, (Fla.) 36 So. 705.

⁶⁶ *Washington v. State*, 23 Tex. App. 336, 5 S. W. 119; *Foster v. State*, 32 Tex. Cr. App. 39, 22 S. W. 21; *Silver v. State*, 17 Ohio 365.

be determined as of the time when the alleged false testimony was given.⁶⁷ Upon this question Professor Greenleaf says:⁶⁸ "As to the materiality of the matter to which the prisoner testified, it must appear either to have been directly pertinent to the issue or point in question, or tending to increase or diminish the damages, or to induce the jury or judge to give readier credit to the substantial part of the evidence."⁶⁹ But the degree of materiality is of no importance; for, if it tends to prove the matter in hand, it is enough, though it be circumstantial.⁷⁰ Thus, falsehood, in the statement of collateral matters, not of substance, such as the day in an action of trespass, or the kind of staff with which an assault was made, or the color of his clothes, or the like, may or may not be criminal, according as they may tend to give weight and force to other and material circumstances, or to give additional credit to the testimony of the witness or of some other witness in the cause.⁷¹ And there-

⁶⁷ *Rex v. Halley*, 1 Car. & P. 258; *Bullock v. Koon*, 4 Wend. (N. Y.) 531; *People v. Lem You*, 97 Cal. 224, 32 Pac. 11; see also, *People v. Hitchcock*, 104 Cal. 482, 38 Pac. 198; *State v. Mooney*, 65 Mo. 494; *Reg. v. Phillpotts*, 3 Car. & Kir. 135, 5 Cox Cr. Cas. 363; *Rex v. Crossley*, 7 Term R. 311, 315; *State v. Whittemore*, 50 N. H. 245, 9 Am. R. 196. Evidence that, in a corporation court having jurisdiction only of offenses committed in the city, on a trial for playing cards in the city, the defendant falsely swore that he had not seen or played in a game outside of the city has been insufficient to sustain a conviction of perjury, without evidence to show the materiality of the facts of which he testified. *Pyles v. State*, (Tex. Cr. App.) 83 S. W. 811. So, in a similar case it was held by the same court that evidence that the game of cards about which the defendant swore falsely was played outside of the city limits, would not support a conviction, in the absence of further proof showing that such false testi-

mony was material to the issue. *Liggett v. State*, (Tex. Cr. App.) 83 S. W. 807.

⁶⁸ 3 Greenleaf Ev., § 195.

⁶⁹ 2 Russell Crimes 600, (5th Eng. ed., Vol. III, 10); 1 Hawkins P. C., chap. 69, § 8; *Rex v. Aylett*, 1 Term R. 63, 69; *Commonwealth v. Parker*, 2 Cush. (Mass.) 212; *Commonwealth v. Knight*, 12 Mass. 274; *Rex v. Prendergast*, Jebb C. C. 64; see also, *State v. Norris*, 9 N. H. 96; *Wood v. People*, 59 N. Y. 117; *Commonwealth v. Grant*, 116 Mass. 17; *State v. Park*, 57 Kans. 431, 46 Pac. 713; *Crump v. Commonwealth*, 75 Va. 922; *Hanscom v. State*, 93 Wis. 273, 67 N. W. 419; *State v. Hunt*, 137 Ind. 537, 37 N. E. 409; 85 Am. Dec. 492, 493, note.

⁷⁰ *Rex v. Gripe*, 1 Ld. Raym. 256; *Reg. v. Rhodes*, 2 Ld. Raym. 886, 890; *State v. Hattaway*, 2 N. & Mc. (S. Car.) 118; *Commonwealth v. Pollard*, 12 Metc. (Mass.) 225; see, *Reg. v. Worley*, 3 Cox Cr. Cas. 535; *Reg. v. Owen*, 6 Cox Cr. Cas. 105.

⁷¹ 1 Hawkin P. C., chap. 69, § 8; 2 Russell Crimes, 600 (5th Eng. ed.,

fore every question upon the cross-examination of a witness is said to be material.⁷² In the answer to a bill in equity, matters not responsive to the bill may be material."⁷³ But, while questions on cross-examination that go to the credit of the witness are generally considered material, the statement of Professor Greenleaf seems to be a little too broad, for if the evidence of the witness in chief is not material and the question on cross-examination does not go to the credit of the witness, it would not, ordinarily, be material.⁷⁴

§ 3080. Collateral matter.—Although the false oath or testimony must be material, it is not necessary that it should be material to the main issue or question.⁷⁵ It may be sufficient if it is material to some collateral matter involved. Thus, it is said, that "a party not only commits perjury by swearing falsely and corruptly as to the fact which is immediately in issue, but also by doing so as to material circumstances which have a legitimate tendency to prove or disprove such fact."⁷⁶ It has been held, for instance, that perjury may be assigned upon false testimony offered to procure the admission in evidence of a material document,⁷⁷ upon a false affidavit for a continuance,⁷⁸ upon false testimony tending to increase or diminish the damages,⁷⁹ or upon false testimony affecting the credibility of a witness.⁸⁰ And it makes no difference that the jury may not have

Vol. III, 10); *Studdard v. Linville*, 3 Hawks (N. Car.) 474; *State v. Norris*, 9 N. H. 96

⁷² *State v. Strat*, 1 Murph. (N. Car.) 124; *Reg. v. Overton*, 2 Moo. C. C. 263, Car. & M. 655; *Reg. v. Lavey*, 3 Car. & Kir. 26; see also, *State v. Hunt*, 137 Ind. 537, 37 N. E. 409; *Hanscom v. State*, 93 Wis. 273, 67 N. W. 419.

⁷³ *Rex v. Melling*, 5 Mod. 348; see also, *Reg. v. Yates*, Car. & M. 132; but compare, *Silver v. State*, 17 Ohio 365.

⁷⁴ *Stanley v. United States*, 1 Okla. 336, 33 Pac. 1025; *Leak v. State*, 61 Ark. 599, 33 S. W. 1067; see also, *State v. Brown*, 68 N. H. 200.

⁷⁵ *Jacobs v. State*, 61 Ala. 448; *Robinson v. State*, 18 Fla. 898; *State v. Wilson*, 156 Ind. 343, 59 N. E. 932; *Commonwealth v. Pollard*, 12

Metc. (Mass.) 225; *State v. Lavalley*, 9 Mo. 834; *Wood v. People*, 59 N. Y. 117; *State v. Brown*, 79 N. Car. 642, 644; *Dilcher v. State*, 39 Ohio St. 130; 2 Bishop Cr. Law, § 1032; 2 Wharton Cr. Law, § 1277.

⁷⁶ *Commonwealth v. Grant*, 116 Mass. 17; see also, *Rex v. Griep*, Holt 535, 12 Mod. 139, 1 Ld. Raym. 256.

⁷⁷ *Reg. v. Phillpotts*, 5 Cox Cr. Cas. 363, 3 Car. & Kir. 135.

⁷⁸ *State v. Winstandley*, 151 Ind. 316, 51 N. E. 92; see also, *Sanders v. People*, 124 Ill. 218, 222, 16 N. E. 81; *State v. Bunker*, 38 Kans. 737, 17 Pac. 651.

⁷⁹ *State v. Norris*, 9 N. H. 96; *Lawrence v. State*, 2 Tex. App. 479; *Stephens v. State*, 1 Swan (Tenn.) 157.

⁸⁰ *Reg. v. Lavey*, 3 Car. & Kir. 26;

believed the false testimony, or that the result would have been the same if the accused had not given false testimony.⁸¹

§ 3081. Materiality—How shown.—The record of the former proceedings is usually admissible and generally necessary to show the materiality of the alleged false testimony, but as will be hereafter shown, parol evidence is admissible in some instances and the reporter who takes down the evidence may read from his notes in a proper case. "Where the proof of materiality is found in the records of the court, or in the documents necessary to show the nature of the proceedings in which the oath was taken, this fact," says Professor Greenleaf, "will appear in the course of proving the proceedings, as has already been shown. But where the perjury is assigned in the evidence given in the cause, it will be necessary, not only to produce the record, but to give evidence of so much of the state of the cause, and its precise posture at the time of the prisoner's testifying, as will show the materiality of his testimony."⁸² In a recent case in which the defendant was charged with having falsely sworn that he did not commit an assault on his wife, the state was allowed to show the assault and all that occurred at the time "in order to develop the materiality of the issue laid in the indictment."⁸³

§ 3082. Record of former proceedings.—To show that the false statement was made in a judicial proceeding, and that it was a material statement, it is generally proper to introduce in evidence the proceedings of the former trial upon which the perjury was committed, and to show defendant's testimony upon that trial.⁸⁴

Reg. v. Gibbons, 9 Cox Cr. Cas. 105; Williams v. State, 68 Ala. 551; People v. Barry, 63 Cal. 62; People v. Courtney, 94 N. Y. 490; United States v. Landsberg, 21 Blatchf. (U. S.) 169, 23 Fed. 585.

⁸¹ Hamper's Case, 3 Leon 230; Wood v. People, 59 N. Y. 117; Pollard v. People, 69 Ill. 148, 154.

⁸² 3 Greenleaf Ev., § 197.

⁸³ Townley v. State, (Tex. Cr. App.) 81 S. W. 309.

⁸⁴ Heflin v. State, 88 Ga. 151, 14 S. E. 112, 30 Am. St. 147 (stating also that, as a general rule, the record,

or a duly authenticated transcript, is necessary to prove the judicial proceedings); Partain v. State, 22 Tex. App. 100, 2 S. W. 854; People v. Macard, 109 Mich. 623, 67 N. W. 968; Kitchen v. State, 26 Tex. App. 165, 9 S. W. 461; Smith v. State, 31 Tex. Cr. App. 315, 20 S. W. 707; Rogers v. State, 35 Tex. Cr. App. 221, 32 S. W. 1044, holds that where it appeared that the false testimony was given upon another date than the one on the certificate, it was proper to show that the certificate was not correctly dated.

The original pleadings, rulings and judgment of the court in the case in which the perjury is alleged to have been committed may be shown in evidence, where the final judgment is not made up.⁸⁵ As said by a recent writer:⁸⁶ "The files of the case in which perjury is charged to have been committed are competent to show the pendency and regularity of that case."⁸⁷ If the charge of perjury is based on evidence given on the trial of a cause, in addition to the production of a record, the previous evidence and state of the cause should be proven, or at least so much of it as shows that the matter sworn to was material to the issue or point in question.⁸⁸ "But it is said that if the defendant is being tried for perjury before the same court in which the testimony was given in the former proceeding, it is not necessary to produce a copy of the record as the court will be presumed to know its own record."⁸⁹

§ 3083. Best evidence.—Where the indictment alleges a false affidavit or any instrument under oath and part of the record of the court, and by the defendant signed and sworn, such instrument is generally the best evidence.⁹⁰ So, where the indictment is for perjury alleged to have been committed on the trial of a cause in a court of record, unless formal proof is waived or otherwise dispensed with, the record, or a duly certified transcript, if permitted, must generally be introduced.⁹¹ But secondary evidence may be admissible in a proper case after laying the necessary foundation, and, as elsewhere shown, the testimony of the witness, not a part of the record, and the identity of the accused may be shown in a proper case by parol evidence.⁹²

§ 3084. Stenographer's notes.—It frequently happens that there is no record of the evidence taken at the former trial and that the

⁸⁵ *Smith v. State*, 103 Ala. 57, 15 So. 866; *People v. Macard*, 109 Mich. 623, 27 N. W. 968; *Boynton v. State*, 77 Ala. 29; *Williams v. State*, 68 Ala. 551; *McMurry v. State*, 6 Ala. 324.

⁸⁶ *Hughes Cr. Law & Proc.*, § 1653.

⁸⁷ *People v. Macard*, 109 Mich. 623, 67 N. W. 968; *Martinez v. State*, 39 Tex. Cr. App. 479, 46 S. W. 826; *Smith v. State*, 103 Ala. 57, 15 So. 866.

⁸⁸ *Young v. People*, 134 Ill. 37, 42 24 N. E. 1070; see, *Martinez v. State*,

39 Tex. Cr. App. 479, 46 S. W. 826; 3 *Starkie Ev.*, 1142.

⁸⁹ *United States v. Erskine*, 4 Cranch (U. S.) 299, 25 Fed. Cas. No. 15057.

⁹⁰ *United States v. Walsh*, 22 Fed. 644; but see, *Schmidt v. United States*, 133 Fed. 257.

⁹¹ *Heflin v. State*, 88 Ga. 151, 14 S. E. 112; 2 *Bishop Cr. Proc.*, § 933b; 2 *Starkie Ev.* 859; 2 *Chitty Cr. Law* 312a; *Wharton Cr. Law*, § 1326.

⁹² See, *People v. Jan John*, 144 Cal. 284, 77 Pac. 950.

alleged false testimony can be shown only by the oral evidence of some one who heard it given or by the stenographer from his notes. It is proper to permit a stenographer who took the testimony of the defendant in the case in which perjury is charged to have been committed to read from his notes, when he swears that he can give it just as the defendant gave it in court.⁹³ Such evidence would seem to be admissible to prove the testimony alleged to be false, upon which the perjury is assigned, and also as bearing upon the question of its materiality.

§ 3085. Parol evidence.—The prosecution in a perjury case may generally show by parol evidence what the defendant swore to in the former proceedings,⁹⁴ and the mere fact that the witness is unable to give an accurate and detailed account of the entire testimony as given by the defendant in the former proceeding, will not prevent him from testifying to the particular part on which the perjury is assigned.⁹⁵ It is also held in a recent case that on the trial of a prosecution for perjury committed in a naturalization proceeding, the defendant's signature to affidavits filed in the proceeding is admissible to prove the fact that he was a witness therein, although such affidavits, when signed, were in blank; that the provision of the Act of Congress that all courts shall, before issuing a final order or certificate of naturalization, "cause to be entered of record the affidavit of the applicant and of his witness, so far as applicable, reciting and affirming the truth of every material fact requisite to naturalization," does not limit the evidence which may be taken in the proceeding to the affidavits so entered of record; and that on the trial of a person for perjury committed in such a proceeding, oral evidence is admissible to show the commission of the offense.⁹⁶

⁹³ *People v. Macard*, 109 Mich. 623, 67 N. W. 968; *State v. Camley*, 67 Vt. 322, 31 Atl. 840; see, *State v. Gibbs*, 10 Mont. 213, 25 Pac. 289 (parol evidence); see also, *Heflin v. State*, 88 Ga. 151, 14 S. E. 112, 30 Am. St. 147.

⁹⁴ *State v. Gibbs*, 10 Mont. 213, 25 Pac. 289, 10 L. R. A. 749; *People v. Curtis*, 50 Cal. 95; *Commonwealth v. Farley*, *Thacher Cr. Cas.* 654;

People v. Macard, 109 Mich. 623, 67 N. W. 968.

⁹⁵ *Hutcherson v. State*, 33 Tex. Cr. App. 67, 24 S. W. 908; *Taylor v. State*, 48 Ala. 157; see also, *Rex v. Jones*, 1 Peake N. P. 37; *United States v. Erskine*, 4 Cranch (U. S.) 299, 25 Fed. Cas. No. 15057.

⁹⁶ *Schmidt v. United States*, 133 Fed. 257.

§ 3086. *Res gestae*.—Evidence of the defendant's acts and declarations at the time of or immediately preceding the giving of the alleged false testimony is admissible in a proper case as being part of the *res gestae*, and material as showing inducement.⁹⁷ The whole *res gestae*, including declarations of the defendant made at the time may be shown as tending to prove that his testimony as to some of the particulars was false.⁹⁸ So, in a prosecution for perjury, where it was charged that defendant swore that he did not, on a particular occasion, assault his wife, it was held competent for the state to show, in connection with testimony of the assault, what occurred at the time, in order to develop the materiality of the issue laid in the indictment.⁹⁹

§ 3087. *Circumstantial evidence*.—Although, as shown in another section, certain matters in a prosecution for perjury must be established by at least one witness and corroborating circumstances, yet this does not mean that circumstantial evidence is not admissible. Whether it is sufficient, of itself, to support a conviction is another question. It is generally admissible as in other cases,¹⁰⁰ although more or different evidence may also be required as to some matters. Thus, circumstantial evidence is admissible in a proper case, to show the truth or falsity of defendant's statement upon the former trial.¹⁰¹ The falsity of other and correlative facts may be shown in a proper case as tending to show defendant's testimony false.¹⁰² And where the indictment charged immaterial as well as material matters alleged to be perjury, evidence of the immaterial matter was held competent where it showed that the testimony on the material matter was wilfully false and not given by mistake.¹⁰³ So, on a prosecution for

⁹⁷ Tuttle v. People, 36 N. Y. 431; State v. Curtis, 12 Ired. L. (N. Car.) 270; see also, Spencer v. Commonwealth, 15 Ky. L. R. 182, 22 S. W. 559.

⁹⁸ Heflin v. State, 88 Ga. 151, 14 S. E. 112, 30 Am. St. 147; see also, Hughes Cr. Law & Proc., § 1659.

⁹⁹ Townley v. State, (Tex. Cr. App.) 81 S. W. 309. "As a part of the *res gestae*," says the court, "was appellant's cursing and abusing of her." See also, Atchison v. State, 44 Tex. Cr. App. 551, 72 S. W. 998.

¹⁰⁰ See, Beach v. State, 32 Tex. Cr. App. 240, 22 S. W. 976; United States v. Wood, 14 Pet. (U. S.) 430; 2 Bishop Cr. Proc., § 932.

¹⁰¹ State v. Swafford, 98 Iowa 362, 67 N. W. 284; Elghmy v. People, 79 N. Y. 546; see, Harkreader v. State, 35 Tex. Cr. App. 243, 33 S. W. 117, 60 Am. St. 40; Reavis v. State, 6 Wyo. 240, 44 Pac. 62.

¹⁰² Cordway v. State, 25 Tex. App. 405, 8 S. W. 670; Brown v. State, 57 Miss. 424.

¹⁰³ Jefferson v. State, (Tex. Cr.

perjury, the criminal record of such person in other cases than the one in which the perjury is alleged to have been committed, was held admissible against the defendant.¹⁰⁴ If the falsity of the statement upon which perjury is assigned is established so as to convince the jury beyond a reasonable doubt, it is sufficient, even though the evidence in addition to that of one witness is circumstantial.¹⁰⁵

§ 3088. Admissions and confessions.—Admissions made by defendant that his former statements under oath were untrue may be used against him.¹⁰⁶ So, letters of the defendant showing that goods cost more than he swore they cost in entering them at the custom house, have been held competent as admissions.¹⁰⁷ It has also been held that where the defendant is indicted for false swearing, the confessions of others and accomplices are admissible to prove the falsity of defendant's statements, even if made in the absence of defendant.¹⁰⁸ But one cannot be convicted of perjury upon proof merely that at another time he made a statement contradicting his alleged false statement.¹⁰⁹

§ 3089. Corroboration.—On a charge of perjury the state, in order to convict, must usually show by two or more witnesses, or by one witness supported by corroborating and independent circumstances, that the former testimony was false.¹¹⁰ One witness may be sufficient

App.) 29 S. W. 1090; see, *People v. Ah Sing*, 95 Cal. 657, 30 Pac. 797.

¹⁰⁴ *Jefferson v. State*, (Tex. Cr. App.) 29 S. W. 1090.

¹⁰⁵ See authorities cited in preceding notes; also, *People v. Porter*, 104 Cal. 415, 38 Pac. 88; *People v. Strassman*, 112 Cal. 683, 45 Pac. 3; *People v. Maxwell*, 118 Cal. 50, 50 Pac. 18; *Sloan v. State*, 71 Miss. 877, 16 So. 262; *Gandy v. State*, 23 Neb. 436, 36 N. W. 817; *Crusen v. State*, 10 Ohio St. 258; *State v. Rutledge*, (Wash.) 79 Pac. 1123.

¹⁰⁶ *United States v. De Amador*, 6 N. Mex. 173, 27 Pac. 488; *Littlefield v. State*, 24 Tex. App. 167, 5 S. W. 650; *Cordway v. State*, 25 Tex. App. 405, 8 S. W. 670.

¹⁰⁷ *United States v. Wood*, 14 Pet. (U. S.) 430; see also, *Rex v. Mayhew*, 6 Car. & P. 315, 25 E. C. L. 450.

¹⁰⁸ *Martin v. State*, 33 Tex. Cr. App. 317, 26 S. W. 400.

¹⁰⁹ *Reg. v. Hughes*, 1 Car. & Kir. 519, 47 E. C. L. 519; *Jackson's Case*, 1 Lewis C. C. 270; *Peterson v. State*, 74 Ala. 34; *Freeman v. State*, 19 Fla. 552; *State v. Buckley*, 18 Ore. 228, 22 Pac. 838; *Schwartz v. Commonwealth*, 27 Gratt. (Va.) 1025, 21 Am. R. 365; *Brooks v. State*, 29 Tex. App. 582, 16 S. W. 542; but see, *Whitaker v. State*, 37 Tex. Cr. App. 479, 36 S. W. 253.

¹¹⁰ *United States v. Hall*, (D. C.) 44 Fed. 864, 10 L. R. A. 324; *United States v. Coons*, 1 Bond (U. S.) 1, 25 Fed. Cas. No. 14860; *Galloway v. State*, 29 Ind. 442; *State v. Raymond*, 20 Iowa 582; *State v. Jean*, 42 La. Ann. 946, 8 So. 480; *Brown v. State*, 57 Miss. 424; *State v. Gibbs*, 10 Mont. 213, 25 Pac. 289, 10 L. R.

to prove the taking of the oath, but one witness, without supporting circumstances, is not sufficient to establish the falsity of the oath.¹¹¹ It was formerly held that two witnesses were necessary, as otherwise it would be oath against oath, but this rule no longer obtains. Indeed, it has been held that the manner and testimony of the defendant may be sufficient corroboration to justify a conviction upon the testimony, in addition to one witness for the state.¹¹² The evidence corroborating may be circumstantial, but it must relate to the material part and must be sufficient to convince the jury.¹¹³ It has been held that proof of the admissions of the defendant contrary to his statements under oath may be sufficient corroboration.¹¹⁴ But it is said in a recent case that corroborative evidence in this connection means evidence aliunde which tends to show the perjury, independent of any declaration or admission of the prisoner, and that the evidence must be something more than sufficient to counterbalance the oath of the prisoner and the legal presumption of his innocence, and the oath of the opposing witness will not avail, unless it is corroborated by other independent circumstances; but that the additional evidence need not be such as standing by itself, would justify a conviction, where the testimony of a single witness would suffice for that purpose.¹¹⁵ And it has been held by the Supreme Court of the United States that there may be cases, where the evidence is documentary, in which no living witness is necessary. We quote from the opinion as follows: "If we will but recognize the principle upon which circumstances in the case of one witness are allowed to have any weight, that principle will carry us out to the conclusion that circumstances, without any witness, when they exist in documentary or written

A. 749; *Gandy v. State*, 23 Neb. 436, 36 N. W. 817, 44 N. W. 108; *State v. Peters*, 107 N. Car. 876, 12 S. E. 74; *Beach v. State*, 32 Tex. Cr. App. 240, 22 S. W. 976; see, 85 Am. Dec. 488, note; 10 L. R. A. 324, 749, note.

¹¹¹ *People v. Hayes*, 70 Hun (N. Y.) 111, 24 N. Y. S. 194, 140 N. Y. 484, 35 N. E. 951, 37 Am. St. 572, 23 L. R. A. 830; *United States v. Hall*, (D. C.) 44 Fed. 864, 10 L. R. A. 324, holds that one witness is sufficient to establish every allegation of the indictment, except the allegation

that the evidence in question was false.

¹¹² *State v. Miller*, 24 W. Va. 802.

¹¹³ *Hernandez v. State*, 18 Tex. App. 134, 51 Am. R. 295; *Beach v. State*, 32 Tex. Cr. App. 240, 22 S. W. 976.

¹¹⁴ *Hemphill v. State*, 71 Miss. 877, 16 So. 261; *State v. Blize*, 111 Mo. 464, 20 S. W. 210; *State v. Moller*, 12 N. Car. 263.

¹¹⁵ *State v. Hunter*, 181 Mo. 316, 80 S. W. 955.

testimony, may combine to establish the charge of perjury; as they may combine, together unaided by oral proof, except the proof of their authenticity, to prove any other fact connected with the declarations of persons or business of human life. That principle is, that circumstances necessarily make up a part of the proofs of human transactions; that such as have been reduced to writing in unequivocal terms, when the writing has been proved to be authentic, cannot be made more certain by evidence aliunde; and that such as have not been reduced to writing, whether they relate to the declarations or conduct of men, can only be proved by oral testimony. If it be true, then, and it is so, that the rule of a single witness, being insufficient to prove perjury rests upon the law of a presumptive equality of credit between persons, or upon what Starkie terms, the apprehension that it would be unsafe to convict in a case where there is merely the oath of one man to be weighed against that of another; satisfy the equal claim to belief, or remove the apprehension, by concurring written proofs, which existed, and are proved to have been in the knowledge of the person charged with the perjury when it was committed, especially if such written proofs came from himself, and are facts which he must have known, because they were his own acts; and the reason for the rule ceases. In what cases, then, will the rule not apply? Or in what cases may a living witness to the corpus delicti of a defendant be dispensed with, and documentary or written testimony be relied upon to convict? We answer, to all such where a person is charged with a perjury, directly disproved by documentary or written testimony springing from himself, with circumstances showing the corrupt intent. In cases where the perjury charged is contradicted by a public record, proved to have been well known to the defendant when he took the oath; the oath only being proved to have been taken. In cases where a party is charged with taking an oath, contrary to what he must necessarily have known to be the truth, and the false swearing can be proved by his own letters, relating to the fact sworn to, or by other written testimony existing and being found in the possession of a defendant, and which has been treated by him as containing the evidence of the fact recited by it."¹¹⁶ In a recent case in Texas, it is held that the general reputation of the corroborating witness for truth and veracity may be inquired into and that where the general reputation of such corroborating witness for truth and veracity is bad and he is contradicted by an unimpeached

¹¹⁶ United States v. Wood, 14 Pet. (U. S.) 430, 441, 442.

and disinterested witness, such testimony will not be sufficient to support a conviction.¹¹⁷

§ 3090. **Defenses.**—Proper evidence is, of course, admissible on behalf of the defendant to rebut and disprove the *prima facie* case made by the prosecution. He may, for instance, introduce evidence fairly tending to show that the oath or testimony on which perjury is assigned was true and not false, or that it was not on a material matter.¹¹⁸ So, he may show, in a proper case, that the court or officer before whom the oath was taken had no jurisdiction or authority, and this will constitute a good defense,¹¹⁹ but, as already shown, mere irregularities and the like are not, ordinarily, jurisdictional, and there are some limitations upon collateral attacks. Evidence of the intoxication of the accused has also been held admissible in his behalf where it tends to show that he could not have sworn wilfully and corruptly.¹²⁰ On the other hand, where the defendant on trial for any charge, falsely swears that he did not commit the unlawful act, the fact that he was justified or acted in self-defense in so acting, is immaterial in his trial for perjury.¹²¹ Nor is the judgment of acquittal in the former case admissible to show the defendant's innocence,¹²² although such evidence has been held admissible as matter

¹¹⁷ *Kitchen v. State*, 29 Tex. App. 45, 14 S. W. 392. But in prosecutions for perjury, as in other cases, hearsay evidence, not coming within any of the recognized exceptions, is inadmissible. *Pollard v. People*, 69 Ill. 148; *State v. Fannon*, 158 Mo. 149, 59 S. W. 75; *Maines v. State*, 23 Tex. App. 568, 5 S. W. 123; *Reavis v. State*, 6 Wyo. 240, 44 Pac. 62.

¹¹⁸ See, *State v. Brown*, 68 N. H. 200, 38 Atl. 731; *State v. Hattaway*, 2 N. & McC. (S. Car.) 118; *Hinch v. State*, 2 Mo. 158.

¹¹⁹ *Lambert v. People*, 76 N. Y. 220; *Jackson v. Humphrey*, 1 Johns. (N. Y.) 498; *Rex v. Cohen*, 1 Stark. 416; see also, *Urquhart v. State*, 103 Ala. 90, 16 So. 17; *Walker v. State*, 107 Ala. 5, 18 So. 393; *Commonwealth v. Hillebrand*, 96 Ky. 407, 29 S. W. 287; *Biggerstaff v. Common-*

wealth, 11 Bush (Ky.) 169; *United States v. Curtis*, 107 U. S. 671, 2 Sup. Ct. 507; 2 Hawkins P. C. (7th ed.) 86; *Roscoe Cr. Ev.* (7th Am. ed.) 817; 2 Wharton Cr. Law, § 1256; 2 Archbold Cr. Proc. & Pl. (8th ed.) 1722; *Muir v. State*, 8 Blackf. (Ind.) 154; *Commonwealth v. White*, 8 Pick. (Mass.) 453; *State v. Furlong*, 26 Me. 69; *Hitesman v. State*, 48 Ind. 473.

¹²⁰ *Lytle v. State*, 31 Ohio St. 196. Or that the testimony was given by surprise, inadvertence and under an excusable mistake. *Rex v. Melling*, 5 Mod. 349; *State v. Woolverton*, 8 Blackf. (Ind.) 452; *Harp v. State*, 59 Ark. 113, 26 S. W. 714.

¹²¹ *Hutcherson v. State*, 33 Tex. Cr. App. 67, 24 S. W. 908.

¹²² *Hutcherson v. State*, 33 Tex. Cr. App. 67, 24 S. W. 908; see also, *State*

of inducement.¹²³ So, it has been said that the fact that an affiant merely stated in his affidavit that he believed it to be true is no defence, where such alleged belief is unreasonable and has no basis.¹²⁴ And the fact that the false testimony was in an affidavit or deposition which was not used on the trial in which it was taken for use, is not a good defense¹²⁵ at least under most of the statutes.

§ 3091. **Variance.**—As already shown, it is not always necessary to prove everything in the indictment upon which perjury is assigned, and where there are several distinct assignments it is generally sufficient to prove any one of them.¹²⁶ So, proof of the substance of the testimony on which perjury is assigned, where the meaning is fairly shown, is generally sufficient.¹²⁷ Variances as to time and date are not always fatal,¹²⁸ but they may be so.¹²⁹ A variance in regard to whether the officer before whom the perjury was alleged to have been committed was elected or appointed has been held immaterial,¹³⁰ but where the indictment alleged that the defendant was sworn by the county clerk and the evidence showed that he was sworn by a city

v. Caywood, 96 Iowa 373, 65 N. W. 385; State v. Williams, 60 Kans. 837, 58 Pac. 476; but see, Cooper v. Commonwealth, 21 Ky. L. R. 546, 51 S. W. 789, 45 L. R. A. 216.

¹²³ Davidson v. State, 22 Tex. App. 373, 3 S. W. 662; Kitchen v. State, 26 Tex. App. 172, 9 S. W. 461. But these authorities also hold that the jury should be instructed that it is limited to that purpose or at least that it should not be considered as proving or disproving perjury.

¹²⁴ See, Johnson v. People, 94 Ill. 513, 514; Commonwealth v. Cornish, 6 Binn. (Pa.) 249; Rex v. Pedley, 1 Leach 365.

¹²⁵ Shell v. State, 148 Ind. 50, 47 N. E. 144; State v. Whittemore, 50 N. H. 245; Reg. v. Vreones, L. R. (1891) 1 Q. B. 360; see also, People v. Naylor, 82 Cal. 607, 23 Pac. 116; United States v. Volz, 14 Blatchf. (U. S.) 15; but compare, State y. Joaquin, 69 Me. 218; Jacobs v. State,

61 Ala. 448; People v. Fox, 25 Mich. 492.

¹²⁶ State v. Hascall, 6 N. H. 352; State v. Blaisdell, 59 N. H. 328; Commonwealth v. Johns, 6 Gray (Mass.) 274; State v. Day, 100 Mo. 242, 12 S. W. 365; Marvin v. State, 53 Ark. 395, 14 S. W. 87; State v. Bordeaux, 93 N. Car. 560; Smith v. State, 103 Ala. 57, 15 So. 866; Harris v. People, 64 N. Y. 148.

¹²⁷ Rex v. Leefe, 2 Campb. 134; Rex v. Jones, 1 Peake N. P. 37; Taylor v. State, 48 Ala. 157.

¹²⁸ Matthews v. United States, 161 U. S. 500, 16 Sup. Ct. 640; see also, Commonwealth v. Monahan, 9 Gray (Mass.) 119.

¹²⁹ Reg. v. Bird, 17 Cox Cr. Cas. 387. As where the indictment is based upon a writing set out in haec verba. Dill v. People, 19 Colo. 469, 36 Pac. 229, 41 Am. St. 254; State v. Ammons, 3 Murph. (N. Car.) 123.

¹³⁰ State v. Williams, 60 Kans. 837, 58 Pac. 476.

clerk, it was held a fatal variance.¹³¹ Other cases showing what is or is not a fatal variance are cited below.¹³²

¹³¹ *McClerkin v. State*, 105 Ala. 107, 17 So. 123; see also, *Cutler v. Territory*, 8 Okla. 101, 56 Pac. 861; but compare, *People v. Nolte*, 19 Misc. (N. Y.) 674, 44 N. Y. S. 443; *Staight v. State*, 39 Ohio St. 496; 2 *Wharton Cr. Law* (9th ed.), § 1287.

¹³² Variance held fatal or substance of issue not proved in, *Dill v. People*, 19 Colo. 469, 36 Pac. 229, 41 Am. St. 254; *Wilson v. State*, 115 Ga. 206, 41 S. E. 696, 90 Am. St. 104; *Hitesman v. State*, 48 Ind. 473;

Walker v. State, 96 Ala. 53, 11 So. 401; *Gandy v. State*, 27 Neb. 707, 43 N. W. 747, 44 N. W. 108; *Sappington v. State*, 114 Ga. 269, 40 S. E. 241; *People v. Strassman*, 112 Cal. 683, 45 Pac. 3; variance held immaterial, see, *State v. Caywood*, 96 Iowa 367, 65 N. W. 385; *Atchison v. State*, 44 Tex. Cr. App. 551, 72 N. W. 998; *Stefani v. State*, 124 Ind. 3, 24 N. E. 254; see also, 99 Am. Dec. 351, note; 87 Am. Dec. 471, note; 17 Am. Dec. 563, note.

CHAPTER CXLIX.

RAPE.

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§ 3092. **Generally.**—Rape is the carnal knowledge of a woman by a man, forcibly and unlawfully, without her consent or against her will; or, of a female child under the age of ten years, or under such age as the statute of the jurisdiction provides, with or without her consent.¹ By consent is meant a conscious permission, and evidence of fraud or fright is proper to prove the lack of consent.² Evidence may be introduced to show that at the time the prosecuting witness was not capable of giving consent, or that the woman had no will, as when insane, an infant under the statutory age of consent, drugged or asleep.³ Penetration is essential,⁴ but it may be very slight, and may

¹ Don Moran v. People, 25 Mich. 356, 359, 12 Am. R. 283; State v. Pickett, 11 Nev. 255, 21 Am. R. 754; Croghan v. State, 22 Wis. 444; Sutton v. People, 145 Ill. 279, 34 N. E. 420; 4 Blackstone Comm. 210; 1 East P. C. 434.

² Commonwealth v. Burke, 105 Mass. 376, 7 Am. R. 531; Turner v. People, 33 Mich. 363; State v. Ward, 73 Iowa 532, 35 N. W. 617; Huston v. People, 121 Ill. 497, 13 N. E. 538.

³ 2 Bishop Cr. Law 1115; 1 Hale P. C. 629; Hawkins P. C., chap. 41; Reg. v. Mayers, 12 Cox Cr. Cas. 311;

Reg. v. Barratt, 12 Cox Cr. Cas. 498; Reg. v. Woodhurst, 12 Cox Cr. Cas. 443; Moody v. People, 20 Ill. 316, 319; State v. Cunningham, 100 Mo. 382, 12 S. W. 376; Felton v. State, 139 Ind. 531, 39 N. E. 228; Pomeroy v. State, 94 Ind. 96; Coates v. State, 50 Ark. 330, 7 S. W. 304; Commonwealth v. Murphy, 165 Mass. 66, 42 N. E. 504; Commonwealth v. Burke, 105 Mass. 376, 7 Am. R. 531; Hughes Cr. Law & Proc., § 285, et seq.; Underhill Cr. Ev., § 407.

⁴ State v. Grubb, 55 Kans. 678, 41 Pac. 951; State v. Dalton, 106 Mo.

be proved by circumstantial evidence,⁵ and actual emission, if ever necessary, is no longer required to be shown.⁶

§ 3093. Burden of proof.—Actual carnal knowledge must be shown, either by direct or indirect evidence.⁷ The burden is upon the state to prove penetration,⁸ but evidence which shows the least penetration is sufficient.⁹ The prosecution must also show that force, either actual or constructive was used,¹⁰ and that there was sufficient force to accomplish a penetration.¹¹ If the state can show that the woman submitted through fear of violence or because of threats of

463, 17 S. W. 700; *Hardtke v. State*, 67 Wis. 552, 30 N. W. 723.

⁵ *State v. Carnagy*, 106 Iowa 483, 76 N. W. 805; *People v. Crowley*, 102 N. Y. 234, 6 N. E. 384; *Taylor v. State*, 111 Ind. 279, 12 N. E. 400; *Brauer v. State*, 25 Wis. 413; *Word v. State*, 12 Tex. App. 174.

⁶ *Waller v. State*, 40 Ala. 325; *State v. Shields*, 45 Conn. 256; *Barker v. State*, 40 Fla. 178, 24 So. 69; *Taylor v. State*, 111 Ind. 279, 12 N. E. 400; *White v. Commonwealth*, 96 Ky. 180, 28 S. W. 340; *Bean v. People*, 124 Ill. 576, 16 N. E. 656; *People v. Courier*, 79 Mich. 366, 44 N. W. 571; *People v. Crowley*, 102 N. Y. 234, 6 N. E. 384; *Comstock v. State*, 14 Neb. 205, 15 N. W. 355; *State v. Hargrave*, 65 N. Car. 466; *Osgood v. State*, 64 Wis. 472, 25 N. W. 529; *Davis v. State*, 43 Tex. 189; see also, *Reg. v. Lines*, 1 Car. & Kir. 393, 47 E. C. L. 393; 1 Hale P. C. 628; 2 Bishop Cr. Law 1085.

⁷ *Hardtke v. State*, 67 Wis. 552, 30 N. W. 723; *Davis v. State*, 43 Tex. 189; *Wesley v. State*, 65 Ga. 731; *Brauer v. State*, 25 Wis. 413; *Hanes v. State*, 155 Ind. 112, 57 N. E. 704 (circumstantial evidence); *State v. Welch*, 41 Ore. 35, 68 Pac. 808 (same).

⁸ *Taylor v. State*, 111 Ind. 279, 12 N. E. 400; *People v. Crowley*, 102 N.

Y. 234, 6 N. E. 384; *Brauer v. State*, 25 Wis. 413; *Audley's Case*, 3 How. St. Tr. 401.

⁹ *Taylor v. State*, 111 Ind. 279, 12 N. E. 400; *People v. Crowley*, 102 N. Y. 234, 6 N. E. 384; *State v. Shields*, 45 Conn. 256; *Bean v. People*, 124 Ill. 576, 16 N. E. 656; *People v. Harlan*, 133 Cal. 16, 65 Pac. 9; *Ellis v. State*, 25 Fla. 702, 6 So. 768; *Wesley v. State*, 65 Ga. 731; *State v. Rollins*, 80 Minn. 216, 83 N. W. 141; *State v. Monds*, 130 N. Car. 697, 41 S. E. 789; *Commonwealth v. Hollis*, 170 Mass. 433, 49 N. E. 632; *Bailey v. Commonwealth*, 82 Va. 107, 3 Am. St. 87; *Murphy v. State*, 108 Wis. 111, 83 N. W. 1112.

¹⁰ *State v. Murphy*, 6 Ala. 765, 41 Am. Dec. 79; *Dawson v. State*, 29 Ark. 116; *Garrison v. People*, 6 Neb. 274; *Osgood v. State*, 64 Wis. 472, 25 N. W. 529; *Mills v. State*, 52 Ind. 187; *Brown v. Commonwealth*, 102 Ky. 227, 43 S. W. 214; *State v. Williams*, 32 La. Ann. 335, 36 Am. R. 272; *Commonwealth v. Fogerty*, 8 Gray (Mass.) 489, 69 Am. Dec. 264; *Williams v. State*, (Tex. App.) 13 S. W. 609.

¹¹ *Commonwealth v. McDonald*, 110 Mass. 405; The prosecuting witness may be asked whether the intercourse caused her pain. *People v. Flynn*, 96 Mich. 276, 55 N. W. 834.

violence, it is sufficient to prove that force was used,¹² but it is held that her will must be so entirely overcome by the fear as to prevent resistance.¹³ The burden is upon the state to prove a boy under fourteen years of age physically capable of committing rape, as he is presumed to be incapable.¹⁴ The burden is upon the state in such a prosecution, as in all other prosecutions, to prove beyond a reasonable doubt the guilt of the defendant.¹⁵ The state must, in general, prove all the material allegations of the indictment, but it has been held that the state need not affirmatively show the prosecutrix to be of good repute; the burden is upon the defendant to show her bad repute.¹⁶ It is upon the state, however, to show where the indictment is for rape of a child under the statutory age of consent, that the child was under the statutory age;¹⁷ and in other cases the burden is upon the state to show want of consent.¹⁸

§ 3094. Presumptions.—The presumption is generally that a boy under the age of fourteen years cannot commit the crime of rape, but this may be rebutted.¹⁹ A child under ten years of age is conclusively incapable of giving her consent,²⁰ and it is generally the rule that a

¹² *State v. Ward*, 73 Iowa 532, 35 N. W. 617; *Turner v. People*, 33 Mich. 363; *Huston v. People*, 121 Ill. 497, 13 N. E. 538; *Bass v. State*, 16 Tex. App. 62; *Ransbottom v. State*, 144 Ind. 250, 43 N. E. 218.

¹³ *State v. Ruth*, 21 Kans. 583; *State v. Ward*, 73 Iowa 532, 35 N. W. 617.

¹⁴ *Gordon v. State*, 93 Ga. 531, 21 S. E. 54, 44 Am. St. 189; *Williams v. State*, 14 Ohio 222, 45 Am. Dec. 536; *Hiltabiddle v. State*, 35 Ohio St. 52, 35 Am. R. 592.

¹⁵ *Anderson v. State*, 41 Wis. 430; *Brown v. State*, 76 Ga. 623; *Austine v. People*, 51 Ill. 236; *People v. McWhorter*, 93 Mich. 641, 53 N. W. 780.

¹⁶ *Commonwealth v. Allen*, 135 Pa. St. 483, 19 Atl. 957, 26 W'kly Notes Cas. 285.

¹⁷ *State v. Houx*, 109 Mo. 654, 19 S. W. 35, 32 Am. St. 686; *Lawrence v. State*, 35 Tex. Cr. App. 114, 32 S.

W. 530; but see, *Nicholas v. State*, 23 Tex. App. 317, 5 S. W. 239.

¹⁸ *State v. Beabout*, 100 Iowa 155, 69 N. W. 429; *Pollard v. State*, 2 Iowa 567; *Strang v. People*, 24 Mich. 1; *People v. Page*, 162 N. Y. 272, 56 N. E. 750; *State v. Taylor*, 57 S. Car. 483, 35 S. E. 729, 76 Am. St. 575; *Jenkins v. State*, 1 Tex. App. 346.

¹⁹ *Hellman v. Commonwealth*, 84 Ky. 457, 1 S. W. 731, 4 Am. St. 207; *Williams v. State*, 14 Ohio 222, 45 Am. R. 536; *People v. Randolph*, 2 Park Cr. Cas. 174; *Wagoner v. State*, 5 Lea (Tenn.) 352, 40 Am. R. 36. If over fourteen capacity, it is said, is presumed. *State v. Handy*, 4 Harr. (Del.) 566; see generally, 42 L. R. A. 589.

²⁰ *State v. Smith*, 9 Houst. (Del.) 588, 33 Atl. 441; *People v. McDonald*, 9 Mich. 150; *Commonwealth v. Sugland*, 4 Gray (Mass.) 7; *Fizell*

girl between the ages of ten and twelve can only give consent when it is shown that she is capable of so doing,²¹ but it is held that such child's inconsistent statements and acts of indecency and immorality with others may be inquired into in a proper case upon her cross-examination.²²

§ 3095. Age of prosecutrix.—A female child under the statutory age is conclusively presumed to be incapable of consenting to sexual intercourse, or, in other words, her consent is no defense, but it has been held that evidence is admissible to show that she understood the nature of the act,²³ and that her bad reputation for chastity may be shown as affecting her credibility.²⁴ The age of the prosecutrix may be proved by her own testimony,²⁵ by that of her parents, or others who know,²⁶ and, in a proper case, by family tradition and pedigree,²⁷ or by records and documents.²⁸ Opinions of medical men have also

v. State, 25 Wis. 364; O'Meara v. State, 17 Ohio St. 515; State v. Sullivan, 68 Vt. 540, 35 Atl. 479. Twelve years,—Murphy v. State, 120 Ind. 115, 22 N. E. 106.

²¹ State v. Houx, 109 Mo. 654, 19 S. W. 35, 32 Am. St. 686.

²² Bessette v. State, 101 Ind. 85; State v. Duffey, 128 Mo. 549, 31 S. W. 98. Not ordinarily, however, upon the question of consent, but rather as affecting her credibility, or the like.

²³ O'Meara v. State, 17 Ohio St. 515.

²⁴ State v. Duffey, 128 Mo. 549, 31 S. W. 98; People v. Johnson, 106 Cal. 289, 39 Pac. 622; see, People v. Glover, 71 Mich. 303, 38 N. W. 874; People v. Abbott, 97 Mich. 484, 56 N. W. 862, 37 Am. St. 360.

²⁵ Weed v. State, 55 Ala. 13; People v. Ratz, 115 Cal. 132, 46 Pac. 915; Commonwealth v. Phillips, 162 Mass. 504, 39 N. E. 109; People v. Bernor, 115 Mich. 692, 74 N. W. 184; State v. Bowser, 21 Mont. 133, 53 Pac. 179; Johnson v. State, 42 Tex. Cr. App. 298, 59 S. W. 398;

Dodge v. State, 100 Wis. 294, 75 N. W. 954.

²⁶ People v. Bernor, 115 Mich. 692, 74 N. W. 184; George v. State, 61 Neb. 669, 85 N. W. 840; Lawrence v. State, 35 Tex. Cr. App. 114, 32 S. W. 530, 539; Reg. v. Nicholls, 10 Cox Cr. Cas. 476.

²⁷ Reg. v. Hayes, 2 Cox Cr. Cas. 226; Bain v. State, 61 Ala. 75. But not by the girl's own declarations to third persons. State v. Deputy, 3 Pen. (Del.) 19; see generally, Vol. I, § 377.

²⁸ See, People v. Ratz, 115 Cal. 132, 46 Pac. 915 (family bible; Commonwealth v. Hollis, 170 Mass. 433, 49 N. E. 632 (birth certificate); People v. Vann, 129 Cal. 118, 61 Pac. 776 (physician's record); Smith v. State, (Tex. Cr. App.) 73 S. W. 401 (same); Reg. v. Weaver, 12 Cox Cr. Cas. 527 (copy of register of births); Rex v. Wedge, 5 Car. & P. 298; but see, People v. Mayne, 118 Cal. 516, 50 Pac. 654, 62 Am. St. 256, and compare, People v. Shepard, 44 Hun (N. Y.) 565; People v. Flaherty, 162 N. Y. 532, 57 N. E. 73.

been held admissible in some instances,²⁹ and it has been held that the appearance of the girl may be taken into consideration.³⁰ But in a recent case in which the age of prosecutrix was in issue, a school-teacher testified that the prosecutrix had gone to school to him, and that he had placed her name and age on the register; that he usually obtained information as to the age of pupils by asking them, their older brothers or sisters, or their parents, but did not know how he had learned the age of prosecutrix, although he got it from some member of the family, and it was held that the register was not admissible to show the age of prosecutrix.³¹

§ 3096. Consent.—As already intimated, where the woman is over the statutory age, so that there is no rape if she consents to the act, it must appear that she did not consent. Proof of consent of the female, over the age named in the statute, is a defence to the action, no matter how reluctantly granted.³² Where consent in a qualified

²⁹ See, *State v. Smith*, 61 N. Car. 302; see also, Vol. I, §§ 676, 677, as to opinion evidence of age.

³⁰ *Commonwealth v. Phillips*, 162 Mass. 504, 39 N. E. 109; *People v. Dickerson*, 58 App. Div. (N. Y.) 202, 68 N. Y. S. 715; *State v. McNair*, 93 N. Car. 628; Vol. I, § 166. That evidence of the resemblance of the child to the alleged father is admissible and that the child may be shown for the purpose of comparison in cases of rape, bastardy and the like, at least when it is sufficiently mature, see, *State v. Danforth*, (N. H.) 60 Atl. 839 (reviewing many authorities); *Finnegan v. Dugan*, 14 Allen (Mass.) 197; *Scott v. Donovan*, 153 Mass. 378, 26 N. E. 871; *Farrell v. Weitz*, 160 Mass. 288, 35 N. E. 783; *Gaunt v. State*, 50 N. J. L. 490, 14 Atl. 600; *Jones v. Jones*, 45 Md. 144; *State v. Woodruff*, 67 N. Car. 89; *State v. Horton*, 100 N. Car. 443, 6 S. E. 238, 6 Am. St. 614; *Wright v. Hicks*, 15 Ga. 160, 60 Am. Dec. 687, 695; *Paulk v. State*, 52 Ala. 427; *Kelly v. State*,

133 Ala. 195, 32 So. 56, 91 Am. St. 25; *Crow v. Jordan*, 49 Ohio St. 655, 32 N. E. 750; *People v. Wing*, 115 Mich. 698, 701, 702, 74 N. W. 179; *Jessup's Estate*, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594; *Marr v. Marr*, 3 U. C. C. P. 36; 52 L. R. A. 500, note, and 84 Am. St. 350, note; but compare, *Risk v. State*, 19 Ind. 152; *Reitz v. State*, 33 Ind. 187; *La Matt v. State*, 128 Ind. 123, 27 N. E. 346; *State v. Harvey*, 112 Iowa 416, 84 N. W. 535, 52 L. R. A. 500, 84 Am. St. 350; *Clark v. Bradstreet*, 80 Me. 454, 15 Atl. 56, 6 Am. St. 221; *Hanawalt v. State*, 64 Wis. 84, 24 N. W. 489, 54 Am. R. 588; *State v. Neel*, 23 Utah 541, 65 Pac. 494.

³¹ *Simpson v. State*, (Tex. Cr. App.) 81 S. W. 320.

³² *Whittaker v. State*, 50 Wis. 518, 7 N. W. 431, 36 Am. R. 856; *Brown v. People*, 36 Mich. 203; *State v. Burgdorf*, 53 Mo. 65; *Huber v. State*, 126 Ind. 185, 25 N. E. 904; *State v. Hammond*, 77 Mo. 157. So held, even though she refused at first, if

sense is obtained through fear, and there is no actual resistance, the prosecution must show generally that the fear was so complete as to preclude all resistance.³³ The age and relations of the parties may be considered and also whether the female was ignorant of the nature of the act.³⁴ It has also been held that the statements of the prosecutrix concerning her consent to the intercourse and as to the force used, are admissible.³⁵ There can be no consent where the woman was asleep, unconscious or completely insensible from intoxication, and evidence of these facts is admissible upon the question of consent.³⁶ Lack of consent is also proved where the state shows the woman to be an idiot or of such a weak mind as to prevent assent,³⁷ and of course, girls under the statutory age cannot give consent.³⁸ Where so called consent is obtained from the woman under the misrepresentation that the intercourse is a part of her medical treatment or surgical operation, such facts may be shown to prove that the intercourse was obtained without a valid consent.³⁹ Proper evidence tending to show the want of chastity of prosecutrix may be introduced and considered in determining the question of consent.⁴⁰ But this, and other evidence bearing upon the subject, will be considered in the sections relating to character and reputation and to circumstantial evidence.

she consented before penetration. *Reg. v. Hallett*, 9 Car. & P. 748, 38 E. C. L. 433; *Whittaker v. State*, 50 Wis. 518, 7 N. W. 431, 36 Am. R. 856. But in such cases there may often be a conviction of assault with intent to rape.

³³ *People v. Flynn*, 96 Mich. 276, 55 N. W. 834; *State v. Ward*, 73 Iowa 532, 35 N. W. 617; *Don Moran v. People*, 25 Mich. 356, 12 Am. R. 283; *State v. Ruth*, 21 Kans. 583; *Ransbottom v. State*, 144 Ind. 250, 43 N. E. 218; *Felton v. State*, 139 Ind. 531, 39 N. E. 228; *Sharp v. State*, 15 Tex. App. 171.

³⁴ *Hawkins v. State*, 136 Ind. 630, 36 N. E. 419; *Ransbottom v. State*, 144 Ind. 250, 43 N. E. 218; *People v. Burwell*, 106 Mich. 27, 63 N. W. 986; *People v. Lenon*, 79 Cal. 625, 21 Pac. 967.

³⁵ *People v. Flynn*, 96 Mich. 276, 55 N. W. 834.

³⁶ *Commonwealth v. Burke*, 105 Mass. 376, 7 Am. R. 531; *Osgood v. State*, 64 Wis. 472, 25 N. W. 529; *State v. Shields*, 45 Conn. 256.

³⁷ *State v. Atherton*, 50 Iowa 189, 32 Am. R. 134.

³⁸ *People v. Johnson*, 106 Cal. 289, 39 Pac. 622; *State v. Eberline*, 47 Kans. 455, 27 Pac. 839; *People v. Glover*, 71 Mich. 303, 38 N. W. 874.

³⁹ *Eberhart v. State*, 134 Ind. 651, 34 N. E. 637; *Pomeroy v. State*, 94 Ind. 96, 48 Am. R. 146; *Reg. v. Flattery*, 13 Cox Cr. Cas. 388; *Don Moran v. People*, 25 Mich. 356, 12 Am. R. 283; but compare, *State v. Murphy*, 6 Ala. 765, 41 Am. Dec. 79; *Reg. v. Clarke*, 6 Cox Cr. Cas. 412.

⁴⁰ *Carney v. State*, 118 Ind. 525, 21 N. E. 48; *McQuirk v. State*, 84 Ala. 435, 4 So. 775, 5 Am. St. 381; *State v. Fitzsimon*, 18 R. I. 236, 27 Atl. 446, 49 Am. St. 766; *Wilson v. State*, 17 Tex. App. 525.

§ 3097. **Resistance.**—The amount of resistance required depends upon the relative strength of the parties and upon the circumstances of each particular case.⁴¹ No invariable rule can be laid down. It is generally said, however, that the woman must exercise actual opposition and the utmost resistance of which she is capable, or at least she must make such resistance as she is reasonably called upon to exercise under the circumstances.⁴² Resistance may be sufficiently proved, however, when it is shown that the act was accomplished by means of threats and fear of bodily injury,⁴³ which overcome the female. "The importance of resistance," it is said, "is simply to show two elements of the crime; carnal knowledge by force by one of the parties and non-consent by the other."⁴⁴ And, as already shown, when the woman is an idiot, overcome by fear and threats, under the age of consent or the like, the rule requiring actual physical resistance does not apply.

§ 3098. **Res gestae.**—Matters constituting part of the *res gestae* are admissible in cases of rape as well as in other cases. Thus, evidence of the conduct and language of the parties at the time of and characterizing the act is admissible.⁴⁵ So, the struggles and outcries of the woman are competent to be shown.⁴⁶ So, the condition of her person

⁴¹ *Felton v. State*, 139 Ind. 531, 39 N. E. 228; *Hawkins v. State*, 136 Ind. 630, 36 N. E. 419; *Anderson v. State*, 104 Ind. 467, 4 N. E. 63; *People v. Crego*, 70 Mich. 319, 38 N. W. 281; *State v. Knapp*, 45 N. H. 148; *Bean v. People*, 124 Ill. 576, 16 N. E. 956; *Commonwealth v. McDonald*, 110 Mass. 405; *Ransbottom v. State*, 144 Ind. 250, 43 N. E. 218; *Brown v. Commonwealth*, 82 Va. 653.

⁴² *Huber v. State*, 126 Ind. 185, 25 N. E. 904; *Anderson v. State*, 104 Ind. 467, 4 N. E. 63; *Oleson v. State*, 11 Neb. 276, 9 N. W. 38, 38 Am. R. 366; *People v. Dohring*, 59 N. Y. 374, 17 Am. R. 349; *People v. Mayes*, 66 Cal. 597, 6 Pac. 691, 56 Am. R. 126; see, 36 Am. R. 860, note; *Mills v. United States*, 164 U. S. 644, 17 Sup. Ct. 210; 80 Am. Dec. 364-367, note.

⁴³ *Ransbottom v. State*, 144 Ind. 250, 43 N. E. 218; *Felton v. State*, 139 Ind. 531, 39 N. E. 228; *People v. Lenon*, 79 Cal. 625, 21 Pac. 967.

⁴⁴ *State v. Shields*, 45 Conn. 256.

⁴⁵ *Castillo v. State*, 31 Tex. Cr. App. 145, 19 S. W. 892, 37 Am. St. 794; 1 McClain's Cr. Law, § 455; 2 Bishop Cr. Proc., § 936; see also, *McMath v. State*, 55 Ga. 303; *People v. Flynn*, 96 Mich. 276, 55 N. W. 834; *State v. Shettleworth*, 18 Minn. 208; *People v. Colletta*, 65 App. Div. (N. Y.) 570, 72 N. Y. S. 903.

⁴⁶ Such evidence might, of course, be original evidence. But it has been held error to permit a witness to testify that he heard cries or noises indicating distress, when he could not state who made the noise nor what it was about. *Baker v. State*, 82 Miss. 84, 33 So. 716. That no outcry was made, although prose-

and clothing and the like at the time and place of the alleged rape may be shown.⁴⁷ And her spontaneous exclamations and complaints may also be so connected with the principal transaction as to be part of the *res gestae*.⁴⁸ Indeed, some authorities admit details of her complaint as part of the *res gestae*, although as shown in another section, her complaint is not ordinarily treated as part of the *res gestae*, but is admitted on another principle, and the details or particulars are excluded in the first instance.

§ 3099. Complaint.—As elsewhere pointed out the use of the woman's complaint in evidence is apparently a relic of the old law of hue and cry.⁴⁹ According to the decided weight of authority in this country, however, while the fact that the prosecutrix made complaint is admissible, the particulars of the complaint cannot be shown by her in the first instance before any attempt has been made to impeach her.⁵⁰ This is true unless the complaint is so recent, so spontaneous,

cutrix knew persons were near has been held admissible. *Sutton v. People*, 145 Ill. 279, 34 N. E. 420; *State v. Patrick*, 107 Mo. 147, 17 S. W. 666; see also, *Huber v. State*, 126 Ind. 185, 25 N. E. 904.

⁴⁷ And in some cases evidence of such matters at a time after the alleged act is treated as admissible as part of the *res gestae*. See generally, *Polson v. State*, 137 Ind. 519, 35 N. E. 907; *State v. Baker*, 106 Iowa 99, 76 N. W. 509; *State v. Hutchinson*, 95 Iowa 566, 64 N. W. 610; *People v. Baldwin*, 117 Cal. 244, 49 Pac. 186; *State v. Murphy*, 118 Mo. 7, 25 S. W. 95; *State v. Sanford*, 124 Mo. 484, 27 S. W. 1099; *Hornbeck v. State*, 35 Ohio St. 277, 35 Am. St. 608; *Proper v. State*, 85 Wis. 615, 55 N. W. 1035; *State v. Sargent*, 32 Ore. 110, 49 Pac. 889; *State v. Robertson*, 38 La. Ann. 618, 58 Am. R. 201; *Brown v. State*, 72 Miss. 997, 17 So. 298; *Rex v. Clarke*, 2 Stark. 241, 3 E. C. L. 393; *State v. Shettleworth*, 18 Minn. 208; *Pefferling v. State*, 40 Tex. 486.

⁴⁸ *McMurrin v. Rigby*, 80 Iowa 322, 45 N. W. 877; *State v. Jerome*, 82 Iowa 749, 48 N. W. 722; *Castillo v. State*, 31 Tex. Cr. App. 145, 19 S. W. 892, 37 Am. St. 794; *State v. Neel*, 21 Utah 151, 60 Pac. 510; *State v. Fitzsimon*, 18 R. I. 236, 27 Atl. 446; some of these cases, perhaps, go a little too far and are not in line with the weight of authority. See also, *Kenney v. State*, (Tex. Cr. App.) 79 S. W. 817, 65 L. R. A. 316, and note.

⁴⁹ See, Vol. I, § 566; Bract. f. 147; 1 Hale P. C. 634; 2 Hale P. C. 279, 284; *Hannon v. State*, 70 Wis. 448, 36 N. W. 1, 3.

⁵⁰ *Bray v. State*, 131 Ala. 46, 31 So. 107; *Barnett v. State*, 83 Ala. 40, 3 So. 612; *Williams v. State*, 66 Ark. 264, 50 S. W. 517; *Hannon v. State*, 70 Wis. 448, 451, 36 N. W. 1; *Lee v. State*, 74 Wis. 45, 41 N. W. 960; *State v. Langford*, 45 La. Ann. 1177, 1179, 14 So. 181; *Lowe v. State*, 97 Ga. 792, 25 S. E. 676; *Baccio v. People*, 41 N. Y. 265, 271; *State v. Harness*, (Idaho) 76 Pac. 788;

and so connected with the principal fact as to constitute part of the *res gestae*. But a few authorities hold that the particulars of the complaint are admissible as *res gestae* declarations even when they would hardly be so considered in any other class of cases.⁵¹ And on cross-examination to impeach her the details may be brought out, or, after the credibility of her testimony on the subject has been attacked, she may show the details of her complaint by herself or the witness to whom she made such complaint.⁵² The theory on which the fact that she made complaint is admitted seems to be that it would be a natural thing to do and that if no evidence were given that she did complain the jury might well infer that she made no complaint and that no such act as that charged was committed by force and without her

Thompson v. State, 38 Ind. 39; *Cross v. State*, 132 Ind. 65, 31 N. E. 473; *Ellis v. State*, 25 Fla. 702, 708, 6 So. 768; *State v. Shettlworth*, 18 Minn. 208, 212; *People v. Stewart*, 97 Cal. 238, 32 Pac. 8; *People v. Scalamjero*, 143 Cal. 343, 76 Pac. 1098; *Oleson v. State*, 11 Neb. 276, 38 Am. R. 366; *State v. Campbell*, 20 Nev. 122, 17 Pac. 620; *State v. Mitchell*, 68 Iowa 116, 119, 26 N. W. 44; *State v. Richards*, 33 Iowa 420; *State v. Clark*, 69 Iowa 294, 28 N. W. 606; *Parker v. State*, 67 Md. 329, 10 Atl. 219; *Stevens v. People*, 158 Ill. 111, 41 N. E. 856; *Pefferling v. State*, 40 Tex. 486; *People v. Tierney*, 67 Cal. 54, 7 Pac. 37; *People v. Mayes*, 66 Cal. 597, 6 Pac. 691; *State v. Daugherty*, 63 Kans. 473, 65 Pac. 695; *People v. Flaherty*, 162 N. Y. 532, 57 N. E. 73; *State v. Sargent*, 32 Ore. 110, 49 Pac. 889; *State v. Neel*, 21 Utah 151, 60 Pac. 510; see also, Vol. I, § 566.

⁵¹ *State v. Kinney*, 44 Conn. 153, 26 Am. R. 436; *McCombs v. State*, 8 Ohio St. 643; *Laughlin v. State*, 18 Ohio 99, 51 Am. Dec. 444; *Bens-tine v. State*, 2 Lea (Tenn.) 169, 31 Am. R. 593; see also, *Hornbeck v. State*, 35 Ohio St. 277, 35 Am. R. 608; *Reg. v. Lillyman*, L. R., (1896)

2 Q. B. 167; *Reg. v. Riendeau*, 9 Quebec Q. B. 147. And in Michigan, while it is held that the general rule is that particulars cannot be given, yet it is held that they may be in exceptional cases, as where the girl is of tender years. *People v. Gage*, 62 Mich. 271, 28 N. W. 835, 4 Am. St. 854; *People v. Glover*, 71 Mich. 303, 38 N. W. 874; see also, Vol. I, § 566.

⁵² *State v. Freeman*, 100 N. Car. 429, 433, 5 S. E. 921; *State v. Brown*, 125 N. Car. 606, 34 S. E. 105; *Wood v. State*, 46 Neb. 58, 64 N. W. 355; *State v. Clark*, 69 Iowa 294, 296, 28 N. W. 606; *Barnett v. State*, 83 Ala. 40, 44, 3 So. 612; *Griffin v. State*, 76 Ala. 29, 32; *Pleasant v. State*, 15 Ark. 624; *Thompson v. State*, 38 Ind. 39; *Parker v. State*, 67 Md. 329, 331, 10 Atl. 219; *State v. Neel*, 21 Utah 151, 60 Pac. 510. But it would seem that the woman must be a witness. See, *Thompson v. State*, 38 Ind. 39; *State v. Meyers*, 46 Neb. 152, 64 N. W. 697, 37 L. R. A. 423; *Hornbeck v. State*, 35 Ohio St. 277, 35 Am. St. 608; *Reg. v. Gut-tridges*, 9 Car. & P. 471, 38 E. C. L. 279; *Commonwealth v. Cleary*, 172 Mass. 175, 51 N. E. 746; *State v. Wolf*, 118 Iowa 564, 92 N. W. 673.

consent, her silence being inconsistent with her charge and present testimony.⁵³ So, after she has been impeached, or her credibility attacked, the details of her complaint are admitted on the principle of corroboration rehabilitating her by evidence of similar statements. The fact that some time elapsed before she made complaint generally goes to her credibility and the weight of the testimony rather than to its competency,⁵⁴ and the delay may be explained by her, as by showing that it was caused by the threats of the prisoner, lack of opportunity, or the like.⁵⁵

§ 3100. Complaint—Particulars.—There is some difference of opinion as to what are particulars within the rule excluding evidence of the particulars of the complaint in the first instance. In some cases the name of the assailant or alleged ravisher has not been considered a particular of the complaint and has been permitted to be stated.⁵⁶ But, as a general rule supported by the weight of authority, it is excluded.⁵⁷ So, her statements as to violence used, the injuries to her

⁵³ See, *State v. Neel*, 21 Utah 151, 60 Pac. 510; *State v. De Wolf*, 8 Conn. 93, 99; *Baccio v. People*, 41 N. Y. 265, 268. Or on the principle of corroboration. *State v. Peterson*, 110 Iowa 647, 82 N. W. 329; *McClain Cr. Law*, § 455.

⁵⁴ *Trimble v. Territory*, (Ariz.) 71 Pac. 932; *State v. Peterson*, 110 Iowa 647, 82 N. W. 329; *State v. Bebb*, (Iowa) 96 N. W. 714; *State v. Mulkern*, 85 Me. 106, 26 Atl. 1017; *Legore v. State*, 87 Md. 735, 41 Atl. 60; *State v. Marcks*, 140 Mo. 656, 41 S. W. 973, 43 S. W. 1095; *State v. Peres*, 27 Mont. 358, 71 Pac. 162; *Higgins v. People*, 58 N. Y. 377; *State v. Sudduth*, 52 S. Car. 488, 30 S. E. 408; *Robertson v. State*, (Tex. Cr. App.) 49 S. W. 398; *State v. Niles*, 47 Vt. 82; but compare, *People v. Lambert*, 120 Cal. 170, 52 Pac. 307; *People v. Duncan*, 104 Mich. 460, 62 N. W. 556; *Dunn v. State*, 45 Ohio St. 249, 12 N. E. 826; *State v. Patrick*, 107 Mo. 147, 17 S. W. 666.

⁵⁵ *State v. Knapp*, 45 N. H. 148, 155; *State v. Shettleworth*, 18 Minn. 208; *State v. Reid*, 39 Minn. 277, 39 N. W. 796; see also, *State v. Peterson*, 110 Iowa 647, 82 N. W. 329; *State v. Wilkins*, 66 Vt. 1, 28 Atl. 323; *Rex v. Rearden*, 4 F. & F. 76; *People v. Glover*, 71 Mich. 303, 38 N. W. 874; *Polson v. State*, 137 Ind. 519, 35 N. E. 907; *State v. Byrne*, 47 Conn. 465; *State v. Baker*, 136 Mo. 74, 37 S. W. 810.

⁵⁶ See, *Ellis v. State*, 25 Fla. 702, 6 So. 768; *State v. Watson*, 81 Iowa 380, 46 N. W. 868; *State v. Hutchinson*, 95 Iowa 566, 64 N. W. 610; *Harmon v. Territory*, 9 Okla. 313, 60 Pac. 115.

⁵⁷ *Bray v. State*, 131 Ala. 46, 31 So. 107; *Thompson v. State*, 38 Ind. 39; *Stevens v. People*, 158 Ill. 111, 41 N. E. 856; *State v. Daugherty*, 63 Kans. 473, 65 Pac. 695; *State v. Robertson*, 38 La. Ann. 618, 58 Am. R. 201; *People v. Clemons*, 37 Hun. (N. Y.) 580; *Johnson v. State*, 21 Tex. App. 368, 17 S. W. 252; *State*

cused of his misconduct with other females, however, is not admissible to show guilt in the case at bar.⁷⁸ And in a recent case, which was a prosecution for rape without force, it was held that the fact that defendant was over sixteen years of age, being a necessary element of the corpus delicti, under the statute, could not be proved by defendant's confession alone.⁷⁹ Where, on a prosecution for assault with intent to rape, the theory of the state was that the defendant had enticed the prosecutrix into his barber shop, and there committed the assault, it was held proper to admit the testimony of her father that when he reached the shop, shortly after the alleged assault, he asked defendant if prosecutrix had been there, and that defendant said that she had; such evidence being competent proof, as an admission by defendant of a material fact in the case, and also to show that the defendant, having told another witness about the same time that the prosecutrix had not been there, had made conflicting statements.⁸⁰ Statements of the prosecutrix that defendant was not guilty or that she had caused his arrest to extort money, have been held admissible.⁸¹ Testimony of the prosecuting witness on a preliminary examination before a justice of the peace relative to the same offense and evidence as to the motive for changing her testimony should be admitted in attacking the credibility of the prosecuting witness.⁸² Where the defendant admits the sexual intercourse, but claims the female's consent thereto, the state is relieved of further proof of the act.⁸³ So, statements of the prosecutrix that she did not consent and as to the force

see also, *Ricks v. State*, (Tex. Cr. App.) 87 S. W. 345, where a witness was permitted to testify that the accused had called attention to a tree under which the prosecutrix testified that the intercourse had taken place and had asked the witness if he supposed any girl had ever had sexual intercourse under such tree.

⁷⁸ *People v. Bowen*, 49 Cal. 654; *People v. Stewart*, 85 Cal. 174, 24 Pac. 722; *Janzen v. People*, 159 Ill. 440, 42 N. E. 862.

⁷⁹ *Wistrand v. People*, 213 Ill. 72, 72 N. E. 748. But his confession has been held sufficient evidence to go to the jury on the subject of identity, where the prosecutrix was

unable to identify him. *State v. Icenbice*, (Iowa) 101 N. W. 273.

⁸⁰ *People v. Scalamiero*, 143 Cal. 343, 76 Pac. 1098; see, however, *People v. Page*, 162 N. Y. 272, 56 N. E. 750.

⁸¹ *Shirwin v. People*, 69 Ill. 55; see also, *Bessette v. State*, 101 Ind. 85; *Callison v. State*, 37 Tex. Cr. App. 211, 39 S. W. 300. But as hereinafter shown, admissions of the prosecutrix are not, ordinarily, treated as admissions of the state or substantive evidence.

⁸² *Bessette v. State*, 101 Ind. 85; *McMath v. State*, 55 Ga. 303.

⁸³ *Anderson v. State*, 104 Ind. 467, 4 N. E. 63.

used, if made in the presence of the defendant and not denied by him, are admissible.⁸⁴ But, while statements of the prosecutrix contrary to her testimony are competent as impeaching evidence, they are not admissions, as the state is the real party, and her attention must first be called to them as in other cases of impeachment of a witness by contradictory statements.⁸⁵ So, where the prosecuting witness was not constant in her accusation, and on the trial testified that her deposition before the examining magistrate was false, it was held that such deposition was admissible only for the purpose of contradicting her testimony, and was not substantive evidence which the jury was entitled to consider as evidence of commission of the crime charged.⁸⁶

§ 3104. Evidence generally—Circumstantial evidence.—The circumstance surrounding the act may be shown as tending to prove whether or not consent was given or the intercourse was against the will of the prosecuting witness.⁸⁷ The relative physical strength of the two parties may be shown.⁸⁸ The defendant may also show that there was no objection except a mere verbal one, and that the prosecutrix made no outcry or actual resistance, and that the act was committed in such a place that a cry or alarm would have been heard by others.⁸⁹ It has also been held that the fact that no complaint was made within a reasonable time, or that the prosecutrix had brought a civil action for seduction, may be shown by the defendant in the

⁸⁴ *People v. Flynn*, 96 Mich. 276, 55 N. W. 834; see also, *Humphrey v. State*, (Tex. Cr. App.) 83 S. W. 187.

⁸⁵ *State v. Brady*, (N. J. L.) 59 Atl. 6; see also, *People v. Lambert*, 120 Cal. 170, 52 Pac. 307; *State v. Shettleworth*, 18 Minn. 208; *State v. Yocum*, 117 Mo. 622, 23 S. W. 765; *State v. Sudduth*, 52 S. Car. 488, 30 S. E. 408.

⁸⁶ *People v. Miner*, (Mich.) 101 N. W. 536.

⁸⁷ *Bean v. People*, 124 Ill. 576, 16 N. E. 56; *People v. Crego*, 70 Mich. 319, 38 N. W. 281; *State v. Knapp*, 45 N. H. 148; *Nugent v. State*, 18 Ala. 521; *Commonwealth v. Thompson*, 116 Mass. 346; *People v. Flynn*, 96 Mich. 276, 55 N. W. 834; *People v. Mayes*, 66 Cal. 597, 6 Pac. 691;

evidence that defendant tried to procure an abortion was held inadmissible in, *Darrell v. Commonwealth*, 26 Ky. L. R. 541, 82 S. W. 289, where he admitted the intercourse, and the only question was as to consent.

⁸⁸ *Jenkins v. State*, 1 Tex. App. 346; *People v. Crego*, 70 Mich. 319, 38 N. W. 281; *Brown v. Commonwealth*, 82 Va. 653; *Nugent v. State*, 18 Ala. 521; *Richards v. State*, 36 Neb. 17, 53 N. W. 1027.

⁸⁹ *State v. Cross*, 12 Iowa 66, 79 Am. Dec. 519; *Reynolds v. People*, 41 How. (N. Y.) 179; *State v. McCaffrey*, 63 Iowa 479, 19 N. W. 331; *State v. Cone*, 1 Jones L. (N. Car.) 18; *Bean v. People*, 124 Ill. 575, 16 N. E. 56.

criminal prosecution for rape.⁹⁰ So, as a circumstance tending to prove the defendant not guilty of rape, it may be shown that the prosecuting witness, just after the time the crime is alleged to have been committed, treated the defendant in a friendly manner.⁹¹ The age and relations of the parties may be shown as circumstances bearing upon the question of consent.⁹² It has also been held that the mental capacity of the prosecutrix, her age and her demeanor, as exhibited during the trial, may be taken into consideration.⁹³ Evidence to the effect that upon the woman's crying out, the defendant immediately relinquished his effort and fled is competent on the question of proving intent to rape,⁹⁴ and the fact that the defendant caught the woman or chased her in a private place may be considered as a circumstance tending to prove the actual intent of the defendant.⁹⁵ It has also been held that the facts that defendant left his home immediately after the offence was committed, and that search was made for him are admissible against him.⁹⁶ And it has likewise been held that the relations between the prosecutrix and defendant prior to the alleged offence may be shown,⁹⁷ and that the prosecutrix may be asked if upon former occasions she did not consent to intercourse.⁹⁸ Evidence of mere opportunity for sexual intercourse is not of itself sufficient to show it,⁹⁹ but it may be inferred from circumstances, as where

⁹⁰ *Eyler v. State*, 71 Ind. 49; *Pollard v. State*, 2 Iowa 567; *State v. Reid*, 39 Minn. 277, 39 N. W. 796; *People v. Knight*, (Cal.) 43 Pac. 6. In a prosecution for assault with intent to rape, defendant contended that the prosecutrix consented to all that was done, and evidence of a witness, who was not more than sixty-five feet from the prosecutrix at the time of the alleged assault, that he called to her in a loud voice for the purpose of attracting her attention, together with the conversation had between the witness and his wife at the time with reference to what they saw and did in consequence thereof, was held admissible for the purpose of contradicting the prosecutrix and corroborating defendant's testimony. *State v. Huff*, (N. Car.) 49 S. E. 339.

⁹¹ *Huber v. State*, 126 Ind. 185, 25

N. E. 904; *State v. Hollenbeck*, 67 Vt. 34, 30 Atl. 696.

⁹² *People v. Burwell*, 106 Mich. 27, 63 N. W. 986; *Hawkins v. State*, 136 Ind. 630, 36 N. E. 419; *State v. McCaffrey*, 63 Iowa 479, 19 N. W. 331.

⁹³ *State v. Philpot*, 97 Iowa 365, 66 N. W. 730; *Thompson v. State*, 44 Neb. 366, 62 N. W. 1060.

⁹⁴ *Taylor v. State*, 50 Ga. 79.

⁹⁵ *State v. Donovan*, 61 Iowa 369, 16 N. W. 206; *Jackson v. State*, 91 Ga. 322, 18 S. E. 132, 44 Am. St. 25.

⁹⁶ *People v. Mayes*, 66 Cal. 597, 6 Pac. 691; see also, *Smith v. Commonwealth*, 26 Ky. L. R. 1229, 83 S. W. 647.

⁹⁷ *State v. Hollenbeck*, 67 Vt. 34, 30 Atl. 696.

⁹⁸ *People v. Abbott*, 97 Mich. 484, 56 N. W. 862, 37 Am. St. 360.

⁹⁹ *State v. Scott*, 28 Ore. 331, 42 Pac. 1; *Bishop Stat. Cr.*, § 679.

a lascivious disposition is shown together with the fact that the parties occupied the same bed under circumstances indicating sexual intercourse, and penetration may be inferred from this and other circumstantial evidence.¹⁰⁰

§ 3105. Other offenses.—The general rule that evidence of other offenses is incompetent to show the guilt of the defendant in the case on trial obtains in cases of rape as in other cases.¹⁰¹ But such evidence has been held admissible to explain the submission of the prosecutrix,¹⁰² and when part of the *res gestae*.¹⁰³ And other acts of undue intimacy between the defendant and the prosecutrix may be shown by him, in a proper case, as furnishing a predicate for the presumption or inference of consent on the occasion in question.¹⁰⁴ It is also held in a recent case that on a prosecution for rape of a girl under the age of consent, testimony of subsequent as well as prior acts of illicit intercourse between the parties is admissible to corroborate her.¹⁰⁵ The same view is also taken in some other jurisdictions.¹⁰⁶ But there is much conflict upon the subject. In one or two jurisdictions it seems to have been held that neither prior nor subsequent acts of intercourse between the parties can be shown.¹⁰⁷ In others, it is held that evi-

¹⁰⁰ *State v. Welch*, 41 Ore. 35, 68 Pac. 809; *State v. Carnagy*, 106 Iowa 483, 76 N. W. 805; *Commonwealth v. Hollis*, 170 Mass. 433, 49 N. E. 632; *People v. Scouten*, 130 Mich. 620, 90 N. W. 332; *Taylor v. State*, 111 Ind. 279, 12 N. E. 400; *Brauer v. State*, 25 Wis. 413.

¹⁰¹ *People v. Bowen*, 49 Cal. 654; *Janzen v. People*, 159 Ill. 440, 42 N. E. 862; *Parkinson v. People*, 135 Ill. 401, 25 N. E. 764; *State v. Bon-sor*, 49 Kans. 758, 31 Pac. 736; *State v. Stevens*, 56 Kans. 720, 44 Pac. 992; *State v. Masteller*, 45 Minn. 128, 47 N. W. 541; *Owens v. State*, 39 Tex. Cr. App. 391, 46 S. W. 240.

¹⁰² *Strang v. People*, 24 Mich. 1; see also, *People v. Fultz*, 109 Cal. 258, 41 Pac. 1040.

¹⁰³ See, *State v. Taylor*, 117 Mo. 181, 22 S. W. 1103; *Cross v. State*, 138 Ind. 254, 37 N. E. 790; *People v. O'Sullivan*, 104 N. Y. 481, 10 N. E.

880; *Parkinson v. People*, 135 Ill. 401, 25 N. E. 764; *State v. Borchert*, 68 Kans. 360, 74 Pac. 1108.

¹⁰⁴ *Barnes v. State*, 88 Ala. 207, 7 So. 38; *People v. Goulette*, 82 Mich. 36, 45 N. W. 1124; *State v. Cook*, 65 Iowa 560, 22 N. W. 675.

¹⁰⁵ *Woodruff v. State*, (Neb.) 101 N. W. 1114.

¹⁰⁶ *State v. King*, 117 Iowa 768, 91 N. W. 768; *People v. Edwards*, (Cal.) 73 Pac. 416; *State v. Borchert*, 68 Kans. 360, 74 Pac. 1108; *Smith v. Commonwealth*, 22 Ky. L. R. 1349, 60 S. W. 531; *State v. Robertson*, 121 N. Car. 551, 28 S. E. 59; *Sykes v. State*, (Tenn.) 82 S. W. 185; *State v. Fetterly*, 33 Wash. 599, 74 Pac. 810; *Lanphere v. State*, 114 Wis. 193, 89 N. W. 128.

¹⁰⁷ *Parkinson v. People*, 135 Ill. 401, 25 N. E. 764; see also, *Barnett v. State*, 44 Tex. Cr. App. 592, 73 S. W. 399, overruling prior decisions.

dence of such prior acts between the parties is admissible and that evidence of subsequent acts is not, ordinarily, admissible.¹⁰⁸

§ 3106. Real evidence.—Real evidence is often admissible in cases of rape. Thus, evidence is not only admissible as to the condition of the clothing of the prosecutrix after the alleged rape, but the clothing itself may be exhibited and put in evidence.¹⁰⁹ It must, however, be identified as that worn by her at the time of the offense.¹¹⁰ So, where the defendant's hat was identified and corresponded with the description given by witnesses of the hat worn by him on the occasion in question, it was held admissible in evidence.¹¹¹ As elsewhere shown, it is also held in many jurisdictions that the child, of which the defendant is claimed to be the father, may be exhibited to the jury.

§ 3107. Physical examination and medical testimony.—As already shown, the condition of the clothing, the physical condition, of the prosecutrix, marks of violence, and even her mental condition, may be shown in a proper case.¹¹² So, for the purpose of proving penetration the condition of the private parts of the prosecutrix after the alleged rape may be shown.¹¹³ This is usually, although not necessarily,

See also, *People v. Harris*, 103 Mich. 473, 61 N. W. 871.

¹⁰⁸ See, *People v. Etter*, 81 Mich. 570, 45 N. W. 1109; *People v. Fowler*, 104 Mich. 449, 62 N. W. 572; *People v. Robertson*, 88 App. Div. (N. Y.) 198, 84 N. Y. S. 401; *State v. Neel*, 23 Utah 27, 65 Pac. 494; *State v. Hilberg*, 22 Utah 27, 61 Pac. 215; *State v. Scott*, 172 Mo. 536, 72 S. W. 897; see also, *State v. Lancaster*, (Idaho) 78 Pac. 1081; *Smith v. State*, (Tex. Cr. App.) 73 S. W. 401; *Manning v. State*, 43 Tex. Cr. App. 54, 65 S. W. 920; see, 62 L. R. A. 332-338, note, reviewing authorities upon the general subject.

¹⁰⁹ *Ransbottom v. State*, 144 Ind. 250, 43 N. E. 218; *State v. Peterson*, 110 Iowa 647, 82 N. W. 329; *State v. Murphy*, 118 Mo. 7, 25 S. W. 95; *Long v. State*, 39 Tex. Cr. App. 461, 46 S. W. 821.

¹¹⁰ *Lowe v. State*, 97 Ga. 792, 25 S. E. 676; *Gonzales v. State*, 32 Tex. Cr. App. 611, 25 S. W. 781.

¹¹¹ *State v. Neal*, 178 Mo. 63, 76 S. W. 958; see also, Vol. II, § 1232.

¹¹² In addition to authorities elsewhere cited, see, *People v. Keith*, 141 Cal. 686, 75 Pac. 304; *State v. Carpenter*, (Iowa) 98 N. W. 775; *State v. Sudduth*, 52 S. Car. 488, 30 S. E. 408; *Bannen v. State*, 115 Wis. 317, 91 N. W. 107.

¹¹³ *Myers v. State*, 84 Ala. 11, 4 So. 291; *Gifford v. People*, 148 Ill. 173, 35 N. E. 754; *Polson v. State*, 137 Ind. 519, 35 N. E. 907; *State v. Sanford*, 124 Mo. 484, 27 S. W. 1099, and authorities cited in following note. But it is not absolutely necessary. *State v. Ogden*, 39 Ore. 195, 65 Pac. 449; *Barnett v. State*, 88 Ala. 40, 3 So. 612; *Frazier v. State*, 56 Ark. 242, 19 S. W. 383. As to

shown by the testimony of a physician who made the examination, and the fact that the examination was not made for several weeks, or even months perhaps, after the time of the alleged offense does not necessarily render the evidence incompetent, but goes to its weight rather than to its competency.¹¹⁴ The time may be so remote, however, as to justify or even require the exclusion of the evidence.¹¹⁵ Expert evidence is also admissible on various other questions in rape cases,¹¹⁶ but not, it seems, as to the effect of indecent liberties upon the mind of the prosecutrix,¹¹⁷ nor as to whether sexual intercourse could be accomplished without the consent or against the resistance of a woman.¹¹⁸

§ 3108. Defenses.—The defense in cases of rape most often consists in controverting the evidence of the state that force was used and that the act was without the woman's consent, although, of course, the sexual intercourse may be denied altogether or the defendant may show that he was not the guilty party. Proper evidence legitimately tending to prove any of these matters in defense is always competent and admissible. So, the defendant, as in other cases, may introduce evidence of his own good character for chastity.¹¹⁹ So, there are cases in which the defendant may show the improper motive of the

whether an examination will be ordered at the request of the defendant, see, *State v. Pucca*, (Del.) 55 Atl. 831; *Barnett v. State*, 83 Ala. 40, 3 So. 612; *McGuff v. State*, 88 Ala. 147, 7 So. 35, and Vol. II, §§ 1231, 1232, 1237, 1238.

¹¹⁴ *People v. Benc*, 130 Cal. 159, 62 Pac. 404; *Gifford v. People*, 148 Ill. 173, 35 N. E. 754; *State v. Watson*, 81 Iowa 380, 46 N. W. 868; *State v. Telpner*, 36 Minn. 535, 32 N. W. 678. *State v. Scott*, 172 Mo. 536, 72 S. W. 897; *Lyles v. United States*, 20 App. Cas. (D. C.) 559; *Commonwealth v. Allen*, 135 Pa. St. 483, 19 Atl. 957; *Gonzales v. State*, 32 Tex. Cr. App. 611, 25 S. W. 781.

¹¹⁵ *State v. Evans*, 138 Mo. 116, 39 S. W. 462, 60 Am. St. 549; *People v. Butler*, 55 App. Div. (N. Y.) 361, 66 N. Y. S. 851; *People v. Cornelius*, 36 App. Div. (N. Y.) 361, 55 N. Y. S. 723.

¹¹⁶ *People v. Baldwin*, 117 Cal. 244, 49 Pac. 186; *State v. Watson*, 81 Iowa 380, 46 N. W. 868; *People v. Duncan*, 104 Mich. 460, 62 N. W. 556; *Young v. Johnson*, 123 N. Y. 226, 25 N. E. 363; *Proper v. State*, 85 Wis. 615, 55 N. W. 1035.

¹¹⁷ *People v. Royal*, 53 Cal. 62.

¹¹⁸ *People v. Benc*, 130 Cal. 159, 62 Pac. 404; *Cook v. State*, 24 N. J. L. 843; *Noonan v. State*, 55 Wis. 258, 12 N. W. 379; *Woodin v. People*, 1 Park. Cr. Cas. (N. Y.) 464; see also, *State v. Hull*, 45 W. Va. 767, 32 S. E. 240.

¹¹⁹ *Hardkte v. State*, 67 Wis. 552, 30 N. W. 723; *Lincecum v. State*, 29 Tex. App. 328, 15 S. W. 818, 25 Am. St. 727; evidence of general reputation for peace or violence was held admissible in, *Horton v. State*, (Miss.) 36 So. 1033; but see, *State v. Brady*, (N. J. L.) 59 Atl. 6.

prosecution.¹²⁰ Other matters that may be shown by the defendant as bearing upon the question of consent or the credibility of the prosecutrix have already been considered. Condonation by the woman cannot be shown as a defense in the criminal prosecution.¹²¹ Where it is only shown that the defendant took indecent liberties with the person of the prosecutrix, with or without her consent, the defendant cannot be found guilty of rape, even if the female was under the statutory age.¹²² To be guilty of rape some slight penetration must be proved and against her will.¹²³ Impotence is a defense,¹²⁴ and intoxication may render one temporarily impotent;¹²⁵ but, if the crime is consummated, intoxication is not a good defense.¹²⁶ It has been held, however, that it may be a defense to a prosecution for assault with intent to rape, where it is such as to prevent the formation of the necessary specific intent.¹²⁷ The defendant, if under fourteen years of age may also show that fact in defense as at least raising the presumption that he was unable to commit rape. At common law this presumption seems to have been conclusive, but it is now generally regarded as rebuttable.¹²⁸ The fact that the defendant was ignorant of the age of the prosecutrix, who was in reality under the age of consent, and believed that she was of sufficient age to give consent, is no defense.¹²⁹ Nor is the previous unchastity of the woman

¹²⁰ *Curby v. Territory*, (Ariz.) 42 Pac. 953; *State v. McDevitt*, 69 Iowa 549, 29 N. W. 459; *Shirwin v. People*, 69 Ill. 55.

¹²¹ *Commonwealth v. Slattery*, 147 Mass. 423, 18 N. E. 399; *State v. Newcomer*, 59 Kans. 668, 54 Pac. 685.

¹²² *Stephens v. State*, 107 Ind. 185, 8 N. E. 94; *White v. State*, 136 Ind. 308, 36 N. E. 274.

¹²³ *Commonwealth v. McDonald*, 110 Mass. 405; *Taylor v. State*, 111 Ind. 279, 12 N. E. 400.

¹²⁴ *Nugent v. State*, 18 Ala. 521; see also, *State v. McCune*, 16 Utah 170, 51 Pac. 818; *Reg. v. Williams*, L. R., (1893) 1 Q. B. 320. Expert evidence as to lost virility is held admissible. *State v. Walke*, (Kans.) 76 Pac. 408.

¹²⁵ *Nugent v. State*, 18 Ala. 521;

Jeffers v. State, 10 Ohio Dec. 832, 20 Ohio C. C. 294.

¹²⁶ *People v. Murray*, 72 Mich. 10, 40 N. W. 29; *State v. Murphy*, 118 Mo. 7, 25 S. W. 95; *Crew v. State*, (Tex. Cr. App.) 23 S. W. 14.

¹²⁷ *State v. Donovan*, 61 Iowa 369, 16 N. W. 206; *Reagan v. State*, 28 Tex. App. 227, 12 So. 601, 19 Am. St. 833, 36 L. R. A. 479, note.

¹²⁸ See, *Bird v. State*, 110 Ga. 315, 35 S. E. 156; *Williams v. State*, 20 Fla. 777; *Davidson v. Commonwealth*, 20 Ky. L. R. 540, 47 S. W. 213; *State v. Coleman*, 54 S. Car. 162, 31 S. E. 866; *Foster v. Commonwealth*, 96 Va. 306, 31 S. E. 503.

¹²⁹ *People v. Ratz*, 115 Cal. 132, 46 Pac. 915; *Holton v. State*, 28 Fla. 303, 9 So. 716; *State v. Sherman*, 106 Iowa 684, 77 N. W. 461; *State*

a defense,¹³⁰ although, as elsewhere shown, it may have an important bearing upon the question of consent.

§ 3109. **Variance.**—The essential elements of the crime should be proved substantially as laid. Where the indictment charges a rape upon a woman, evidence of sexual intercourse with a child under the age of consent, without proof that it was by force and without her consent, has been held insufficient, even though no such proof would have been necessary if the indictment had charged rape on a child under the age of consent.¹³¹ So, it has been held that proof of an assault with intent to rape by fraud will not sustain a charge of committing an assault with intent to rape by force.¹³² But this would not, perhaps, be held under other statutes.¹³³ And a conviction for rape may be had under an indictment therefor upon proof of all the essential elements, even though the child is under the age of consent, and intercourse with her would be a distinct crime if she had attempted to consent.¹³⁴

v. Baskett, 111 Mo. 271, 19 S. W. 1097; Edens v. State, (Tex. Cr. App.) 43 S. W. 89; Smith v. State, 44 Tex. Cr. App. 137, 68 S. W. 995; Commonwealth v. Murphy, 165 Mass. 66, 42 N. E. 504, 30 L. R. A. 734.

¹³⁰ McQuirk v. State, 84 Ala. 435, 4 So. 775; People v. Hartman, 103 Cal. 242, 37 Pac. 153; Pratt v. State, 19 Ohio St. 277.

¹³¹ Greer v. State, 50 Ind. 267; see also, State v. Erickson, 45 Wis. 86; Bishop Stat. Cr., § 487; Dick v. State, 30 Miss. 631; State v. Jackson, 30 Me. 29.

¹³² Ford v. State, 41 Tex. Cr. App. 270, 53 S. W. 846.

¹³³ See, State v. Austin, 109 Iowa 118, 80 N. W. 303; Mobley v. State, 46 Miss. 501.

¹³⁴ Rex v. Wedge, 5 Car. & P. 298; Reg. v. Nicholls, 10 Cox Cr. Cas. 476; Commonwealth v. Sugland, 4 Gray (Mass.) 7; State v. Gaul, 50 Conn. 578; State v. Storkey, 63 N. Car. 7; State v. Staton, 88 N. Car. 654; Vasser v. State, 55 Ala. 264; State v. Worden, 46 Conn. 349, 362, 33 Am. R. 27.

CHAPTER CL.

RECEIVING STOLEN GOODS.

Sec.	Sec.
3110. Meaning of term.	3116. Character evidence.
3111. Presumptions.	3117. Identification of goods.
3112. Burden of proof.	3118. Other instances of receiving stolen goods.
3113. Burden of proof—Essential elements and material facts.	3119. Defenses.
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§ 3110. **Meaning of term.**—Receiving stolen goods is said to be the short name usually given to the offense of receiving any goods or chattels with the knowledge that they have been feloniously or unlawfully stolen, taken, extorted, obtained, embezzled or disposed of.¹ But in some states the offense is committed only in case the property was stolen. And a receiver of stolen property has been defined as “one who receives into his possession or under his control, with felonious intent, any stolen goods or chattels, with knowledge that they have been stolen.”² At common law it seems that while so receiving stolen goods may have been a misdemeanor it did not make the receiver accessory to the theft. It is now made a substantive crime in England and some states by statute, and in a few others the receiver is an accessory after the fact.³

§ 3111. **Presumptions.**—The so-called presumption of guilt arising from the recent possession of stolen property has been held to apply to one charged with unlawfully receiving it as well as to one charged with the original taking.⁴ But it is not conclusive,⁵

¹ Black's L. Dict.

² 24 Am. & Eng. Ency. of Law (2d ed.) 44.

³ See for remarks on the history of the offense and statutes, Anderson v.

State, 38 Fla. 3, 20 So. 765; Curran v. State, (Wyo.) 76 Pac. 577; State v. Hazard, 2 R. I. 474, 60 Am. Dec.

96.

⁴ People v. Weldon, 111 N. Y. 569.

and it would seem that, ordinarily, the presumption, if any, other than of innocence, would be that of larceny rather than of a felonious receiving of the goods knowing them to be stolen.⁶ Failure, however, by one in possession of stolen goods to make a reasonable explanation has been held sufficient to raise a presumption, or at least an inference of guilt.⁷ But where a reasonable explanation is given it is held that no such inference arises.⁸ When the circumstances tend to show that certain stolen goods have been in the possession of the accused for a long time before their discovery it has been held that such possession may raise a presumption or inference of guilt against one charged with receiving them though such goods were not found until more than three months after they were stolen.⁹ It has been held that the possession by a person of stolen property recently after the theft raises a presumption that he stole it, but the mere fact of recent possession of stolen property, by a person who is charged with receiving stolen property, knowing it to be stolen, does not raise a presumption that he had knowledge that it was stolen.¹⁰ But recent possession in connection with other circumstances of a peculiar and suspicious character has been held sufficient to warrant a presumption, or at least an inference of guilty knowledge, if it may reasonably be inferred from the circumstances that the one in possession of the goods did not commit the larceny himself.¹¹ But the mere purchase of stolen goods for less than their value does not raise a presumption of knowledge that they were stolen.¹² The omission of the accused to testify in his own behalf, creates no presumption

19 N. E. 279; see also, *Sahlinger v. People*, 102 Ill. 241, 244; *State v. Grebe*, 17 Kans. 458; *Jenkins v. State*, 62 Wis. 49, 21 N. W. 232.

⁶ *State v. Pomeroy*, 30 Ore. 16, 46 Pac. 797.

⁷ See, *Durant v. People*, 13 Mich. 351; *Sartorius v. State*, 24 Miss. 602; *State v. Bulla*, 89 Mo. 595, 1 S. W. 764; *Trail v. State*, (Tex. Cr. App.) 57 S. W. 92. In, *State v. Richmond*, (Mo.) 84 S. W. 880; the case of *State v. Guild*, 149 Mo. 370, 50 S. W. 909, 73 Am. St. 395, which disapproved, *State v. Bulla*, supra, is itself disapproved, and the doctrine of the older case again af-

firmed. See also, *Reg. v. Oddy*, 5 Cox Cr. Cas. 210.

⁸ *Huggins v. People*, 135 Ill. 243, 25 N. E. 1002, 25 Am. St. 357; *State v. Mayer*, 45 Iowa 698; *State v. Miller*, 159 Mo. 113, 60 S. W. 67.

⁹ *Williams v. State*, 29 Tex. App. 167, 15 S. W. 285; *Estes v. State*, 23 Tex. App. 600, 5 S. W. 176.

¹⁰ *Jenkins v. State*, 62 Wis. 49, 21 N. W. 232.

¹¹ *State v. Bulla*, 89 Mo. 595, 1 S. W. 764.

¹² *State v. Mayer*, 45 Iowa 698; *Goldstein v. People*, 82 N. Y. 231; *Sartorius v. State*, 24 Miss. 602.

¹³ *Sartorius v. State*, 24 Miss. 602.

against him, yet his failure to account in any way for his possession of a large sum of money may be a significant circumstance to be considered by the jury.¹³ It has been held in some cases that the fact that the accused knew the goods to have been stolen is, in the absence of other evidence, conclusive proof that he received the same with intent to defraud the owner.¹⁴ But in a number of jurisdictions it is held that the presumption, if any, against the accused, arising from recent possession of goods is that the possessor is guilty of larceny and not a felonious reception.¹⁵

§ 3112. Burden of proof.—The burden or proof, as in other crimes, is on the prosecution to establish the guilt of the accused.¹⁶ But the burden of showing that one was not properly convicted as a thief is upon the one who has received the goods when the record of the conviction and sentence of such thief is introduced in evidence,¹⁷ if that question can be gone into at all. The general rule, however, is that the burden is upon the prosecution to establish every essential element of the crime and ultimately convince the jury of the guilt of the accused beyond a reasonable doubt.

§ 3113. Burden of proof—Essential elements and material facts. The essential elements of the crime and the material facts to be proved by the state are in general, (1) the larceny of the goods by some thief; (2) the subsequent reception of the stolen goods by the prisoner; (3) that he knew at the time that they were stolen.¹⁸ Proof that the goods were actually stolen is essential, and the mere possession of them by another than the owner has no tendency in itself, it is said, to prove that fact.¹⁹ Neither can the theft be proved as against a person charged with receiving the stolen goods by the confession or declarations of the thief.²⁰ The fact that defendant knew the goods

¹³ *Jenkins v. State*, 62 Wis. 49, 21 N. W. 232.

¹⁴ *United States v. Lowenstein*, 21 D. C. 515.

¹⁵ *Slisk v. State*, (Tex. Cr. App.) 42 S. W. 985; *State v. Bulla*, 89 Mo. 595, 1 S. W. 764; *Sartorius v. State*, 24 Miss. 602; *People v. Welton*, 111 N. Y. 569, 19 N. E. 279.

¹⁶ *Anderson v. State*, 63 Ga. 675. The state must show that the

goods were, in fact, stolen goods. *State v. Kinder*, 22 Mont. 516, 57 Pac. 94.

¹⁷ *Coxwell v. State*, 66 Ga. 309; *Cooper v. State*, 29 Tex. App. 8, 13 S. W. 1011, 25 Am. St. 712; *Anderson v. State*, 63 Ga. 675.

¹⁸ *Reilley v. State*, 14 Ind. 217.

¹⁹ *Bailey v. State*, 52 Ind. 462.

²⁰ *Reilley v. State*, 14 Ind. 217.

to be stolen when he received them must be affirmatively proved,²¹ but his guilty knowledge may be inferred from circumstances.²² And the fact that they were concealed in the defendant's house in places where such goods would not ordinarily be kept has been held competent evidence of guilty knowledge.²³ It has also been held in some jurisdictions that it must also be shown that the goods were received either directly or indirectly from the thief,²⁴ and that any allegations as to the identity of the thief must be proved as laid.²⁵ But the weight of authority, under most of the statutes, is to the effect that one may be guilty of receiving stolen goods, although he receives them from some person other than the person who committed the larceny, and that, if it is properly shown that they are stolen goods, and the other elements of the crime are established, the name of the thief is immaterial.²⁶ It is also held in the Wyoming case cited in support of the last proposition that it was not essential that the larceny should have been committed in that state if the stolen goods were received there with guilty knowledge.

§ 3114. Knowledge that goods were stolen.—All the facts and circumstances from which the inference of guilty knowledge arises are, in general, competent to prove such knowledge.²⁷ It may be inferred from circumstances leading a reasonable man to believe that the goods were stolen.²⁸ Thus, the fact that a party received stolen

²¹ *Robinson v. State*, 84 Ind. 452; *Foster v. State*, 106 Ind. 272, 6 N. E. 641.

²² *Goodman v. State*, 141 Ind. 35, 39 N. E. 939.

²³ *Semon v. State*, 158 Ind. 55, 62 N. E. 625.

²⁴ *Foster v. State*, 106 Ind. 272, 278, 6 N. E. 641; *State v. Ives*, 13 Ired. L. (N. Car.) 338.

²⁵ *Foster v. State*, 106 Ind. 272, 6 N. E. 641; *Semon v. State*, 158 Ind. 55, 62 N. E. 625.

²⁶ *Curran v. State*, (Wyo.) 76 Pac. 577; *Smith v. State*, 59 Ohio St. 350, 52 N. E. 826; *People v. Clausen*, 120 Cal. 381, 52 Pac. 658; *Kirby v. United States*, 174 U. S. 47, 19 Sup. Ct. 574; *State v. Fink*, (Mo.) 84 S. W. 921; *Levi v. State*, 14 Neb. 1, 14 N. W. 543.

²⁷ *Huggins v. People*, 135 Ill. 243, 25 N. E. 1002, 25 Am. St. 357; *People v. Schooley*, 149 N. Y. 99, 43 N. E. 536, aff'g 89 Hun (N. Y.) 391, 35 N. Y. S. 429; *Commonwealth v. Billings*, 167 Mass. 283, 45 N. E. 910; *Murio v. State*, 31 Tex. Cr. App. 210, 20 S. W. 356; *People v. Clausen*, 120 Cal. 381, 52 Pac. 658; *Licette v. State*, 75 Ga. 253; *State v. Guild*, 149 Mo. 370, 50 S. W. 909 (conduct and attempt to escape).

²⁸ *Birdsong v. State*, (Ga.) 48 S. E. 329; *Delahoyde v. People*, 212 Ill. 554, 72 N. E. 732. In, *Cobb v. State*, 76 Ga. 664, it is said: "Circumstances may convict of the defendant's knowledge, as well as actual and direct proof. . . . The circumstances, the time, the secrecy, all the transactions before, at the

them to be stolen, for the purpose of aiding the thief in concealing them or in escaping with them, is as much an offense as if the receiving be done with the hope of obtaining a reward from the owner or other pecuniary gain or advantage.⁴³

§ 3116. Character evidence.—Evidence of the good character of the accused has been held competent.⁴⁴ This is in accordance with the general rule.⁴⁵ But in some jurisdictions it is held that evidence of good character is not competent unless the other evidence in the case is circumstantial or unless the guilt of the accused is doubtful.⁴⁶ Evidence of the character of parties who frequented defendant's house, and from whom he received goods, has been held competent,⁴⁷ as tending to show his knowledge that they were stolen. So, evidence of the reputation of the thief from whom he received the goods may be admissible for the same purpose,⁴⁸ at least where the accused is shown to have knowledge thereof.⁴⁹

§ 3117. Identification.—The receipt of the stolen goods by the accused must be shown, and in order to do this they must be identified in some way. It has been held proper to hand to the witness articles similar to those stolen, to enable him to identify and prove the kind of articles stolen.⁵⁰ And it has been held that all the circumstances of the case properly bearing upon the question should be taken into consideration in determining the question as to the receipt

see, *State v. Lane*, 68 Iowa 384, 27 N. W. 266; *Rex v. Davis*, 6 Car. & P. 177, 25 E. C. L. 381.

⁴⁴ *People v. Wiley*, 3 Hill (N. Y.) 194; *State v. Rushing*, 69 N. Car. 29; *Commonwealth v. Bean*, 117 Mass. 141; *State v. Hazard*, 2 R. I. 474; *Rex v. Richardson*, 6 Car. & P. 335, 25 E. C. L. 461.

⁴⁵ *Jupitz v. People*, 34 Ill. 516.

⁴⁶ See, *People v. Hurley*, 60 Cal. 74, 44 Am. R. 55; *State v. Ford*, 3 Strob. L. (S. Car.) 517; ante, Vol. I, § 168. But it is questionable whether such evidence of itself is sufficient to rebut the presumption of guilt, where it arises, and the evidence should be considered in connection with the other evidence in the case. *Wag-*

ner v. State, 107 Ind. 71, 7 N. E. 896, 57 Am. R. 79; *Holland v. State*, 131 Ind. 568, 31 N. E. 359.

⁴⁷ *Hey v. Commonwealth*, 32 Gratt. (Va.) 946, 34 Am. R. 799.

⁴⁸ *Goodman v. State*, 141 Ind. 35, 39 N. E. 939; *Morgan v. State*, 31 Tex. Cr. App. 1, 18 S. W. 647.

⁴⁹ *Huggins v. People*, 135 Ill. 243, 25 N. E. 1002, 25 Am. St. 357; *Commonwealth v. Gazzolo*, 123 Mass. 220, 25 Am. R. 79.

⁵⁰ *Friedberg v. People*, 102 Ill. 160; *State v. Goldblat*, 50 Mo. App. 186.

⁵⁰ *Jupitz v. People*, 34 Ill. 516. But mere similarity has been held in itself insufficient evidence of identity. *Commonwealth v. Billings*, 167 Mass. 283, 45 N. E. 910.

and identification of the stolen property.⁵¹ In a certain case papers produced from a closet, to which there was evidence that defendant had access, which papers, as the testimony also tended to show, were wrappers of the stolen goods, were held admissible in evidence.⁵² And evidence as to the similarity of wrapping paper found in the room of the accused,⁵³ or as to the use of certain marks,⁵⁴ has been held competent. Thus a witness may testify that he saw the goods in the possession of the accused and knew them by certain marks.⁵⁵ And evidence of the receiving of other goods has been held admissible to aid in the identification of the goods in question, where it fairly tended to do so.⁵⁶

§ 3118. Other instances of receiving stolen goods.—Other instances of receiving stolen goods, knowing them to be stolen, may be introduced⁵⁷ in a proper case. Thus, to prove guilty knowledge it may be shown that the accused had received stolen goods on another occasion.⁵⁸ And evidence of his having other stolen goods in his possession has also been held competent to show guilty knowledge.⁵⁹ “The rule as to such evidence is that when there is a question whether a person said or did something, the fact that he said or did something of the same sort on a different occasion may be proved, if it shows the existence on the occasion in question of any intention, knowledge, good or bad faith, malice, or other state of mind, or of any state of body or bodily feeling, the existence of which is in issue or is deemed to be relevant to the issue; but such acts or words may not be proved merely in order to show that the person so acting or speaking was likely, on the occasion in question, to act in a similar man-

⁵¹ *People v. Kiley*, 107 Mich. 345, 65 N. W. 233; *People v. Connor*, 141 N. Y. 583, 36 N. E. 345; *Hester v. State*, 103 Ala. 83, 15 So. 857; *Jenkins v. State*, 62 Wis. 49, 21 N. W. 232.

⁵² *Commonwealth v. Mullen*, 150 Mass. 394, 23 N. E. 51.

⁵³ *Commonwealth v. Mullen*, 150 Mass. 394, 23 N. E. 51; *Polin v. State*, (Tex. Cr. App.) 65 S. W. 183.

⁵⁴ *People v. Maloney*, 113 Mich. 536, 71 N. W. 866; *Hester v. State*, 103 Ala. 83, 15 So. 857.

⁵⁵ *Hester v. State*, 103 Ala. 83, 15 So. 857.

⁵⁶ *People v. McClure*, 148 N. Y. 95, 42 N. E. 523; see also, *State v. Hanna*, 35 Ore. 195, 57 Pac. 629.

⁵⁷ *Shriedley v. State*, 23 Ohio St. 130; *Yarborough v. State*, 41 Ala. 405; *Devoto v. Commonwealth*, 3 Metc. (Ky.) 417; *Goodman v. State*, 141 Ind. 35, 39 N. E. 939; 62 L. R. A. 269, 317, note.

⁵⁸ *State v. Ward*, 49 Conn. 429; *Commonwealth v. Johnson*, 133 Pa. 293, 19 Atl. 402.

⁵⁹ *Devoto v. Commonwealth*, 3 Metc. (Ky.) 417.

ner.”⁶⁰ The facts that the accused received from another articles stolen by him from a third person in the course of several months, and that the accused pledged all of them, are deemed to be relevant to the fact that the accused knew that the goods in question were stolen by the other from the third person.⁶¹ And so, evidence that the accused persons had received other stolen goods than those described in the indictment about the same time, and stolen from the same person, has been held competent, as tending to show guilty knowledge that the goods in question were stolen.⁶² Evidence of previous purchases from the same thief of goods known to have been stolen is admissible to show guilty knowledge on the part of the receiver,⁶³ and it was so held where the circumstances of the previous dealing were suspicious and the price grossly inadequate,⁶⁴ although the property was stolen from different persons. So, in other cases it has been held that evidence of similar transactions of the accused, other than those connected with the offense charged, may be given for the purpose of showing guilty knowledge,⁶⁵ and that evidence that the accused has frequently received similar articles of property, under like circumstances, from the same thief, stolen from the same person or place, knowing that they were stolen, is proper upon the question of guilty knowledge.⁶⁶ And, again, it is held that evidence of previous transactions between accused and the thief, in reference to other stolen property, is competent to show knowledge that the goods were stolen.⁶⁷ Evidence that the supposed thief had stolen other goods of the same kind has, however, been held not to be competent.⁶⁸ And the fact that the accused received property on other occasions from still other persons, knowing it to have been stolen, was held in one case not to be relevant,⁶⁹ where the property was different

⁶⁰ Stephen Dig., Art. 11.

⁶¹ *Coleman v. People*, 58 N. Y. 555; *State v. Ward*, 49 Conn. 429; *Kilrow v. Commonwealth*, 89 Pa. St. 480; *Shriedley v. State*, 23 Ohio St. 130.

⁶² *State v. Jacob*, 30 S. Car. 131, 8 S. E. 698, 14 Am. St. 897.

⁶³ *Shriedley v. State*, 23 Ohio St. 130; *People v. McClure*, 148 N. Y. 95, 42 N. E. 523; *People v. Grossman*, 168 N. Y. 51, 60 N. E. 1050.

⁶⁴ *People v. Doty*, 175 N. Y. 164, 67 N. E. 303.

⁶⁵ *Coleman v. People*, 1 Hun (N. Y.) 596, 4 Thomp. & C. (N. Y.) 61.

⁶⁶ *Copperman v. People*, 56 N. Y. 591.

⁶⁷ *State v. Feuerhaken*, 96 Iowa 299, 65 N. W. 299.

⁶⁸ *McIntire v. State*, 10 Ind. 26; see also, *Reg. v. Oddy*, 5 Cox Cr. Cas. 210.

⁶⁹ *Coleman v. People*, 55 N. Y. 81; see also, *Reg. v. Oddy*, 5 Cox Cr. Cas. 210.

in kind, and was stolen from a different person and received from a different person.

§ 3119. Defenses.—If the goods are received in good faith on behalf of the owner with the honest intention and purpose of delivering them to him without reward, and they are so restored, this will constitute a good defense.⁷⁰ The prosecution may also be barred by the statute of limitations.⁷¹ And a former acquittal may constitute a good defense,⁷² but an acquittal of breaking into a house with intent to steal and taking goods therefrom is not a bar to a prosecution for receiving stolen goods.⁷³ What the accused said on the discovery of the goods with him has been held admissible in his favor, if made instantaneously and without opportunity for concoction, as a part of the *res gestae*.⁷⁴ And so it has been held competent for the defense to show by the accused, he being a witness in his own behalf, when, from whom, how, and under what circumstances he received the property and what was done and said at the time in connection with the receipt of it by himself; such facts being part of the *res gestae* to be submitted as evidence, and weighed by the jury.⁷⁵ Evidence that the vendor of the goods in question claimed the same as his own before the sale to the accused, is properly admissible in defense.⁷⁶ And it has been held that a dealer in second-hand goods may show the custom not to pay a full price for goods which they deal in, even though practically new, in order to rebut the presumption or inference of guilty knowledge from the purchase of such goods at a greatly reduced price.⁷⁷

§ 3120. Evidence in general.—Evidence is admissible against the accused of conversations between the defendant and the thief, making arrangements for receiving the goods, before the offense was committed.⁷⁸ And conversations between the accused and the thief on previous occasions, when the accused received similar goods from the

⁷⁰ *Aldrich v. People*, 101 Ill. 16.

⁷¹ *Jones v. State*, 14 Ind. 346.

⁷² *People v. Willard*, 92 Cal. 482, 28 Pac. 585.

⁷³ *Pat v. State*, 116 Ga. 92, 42 S. E. 389; *Commonwealth v. Bragg*, 104 Ky. 306, 47 S. W. 212.

⁷⁴ *Bennett v. People*, 96 Ill. 602; *Henderson v. State*, 70 Ala. 23;

Payne v. State, 57 Miss. 348; *McPhail v. State*, 9 Tex. App. 164.

⁷⁵ *State v. Bethel*, 97 N. Car. 459, 1 S. E. 551.

⁷⁶ *Harwell v. State*, 22 Tex. App. 251, 2 S. W. 606.

⁷⁷ *Andrews v. People*, 60 Ill. 354.

⁷⁸ *Commonwealth v. Jenkins*, 10 Gray (Mass.) 435.

thief, have also been held competent to show guilty knowledge.⁷⁹ And so conversations between the thieves before and after the commission of the theft may be admissible to show how it was planned and accomplished.⁸⁰ And if it is shown that there was a fraudulent conspiracy between those who stole the goods and the one who received the goods to sell or dispose of them, it has been held, as in other cases of conspiracy, that the acts or statements of one of the conspirators in reference to the undertaking, even in the absence of the accused, are competent against the accused if made before the property is disposed of.⁸¹ It has been held that the declaration of the one holding the property that he received it from another may be taken as sufficient proof that he received it from the thief rather than that he himself stole it.⁸² Evidence that defendant also had other stolen property of the same kind in his possession is admissible,⁸³ in a proper case, but evidence that the thief from whom the defendant received the property had also been guilty of another theft is inadmissible.⁸⁴ Where the defendant was charged with receiving stolen goods during the continuance of a partnership of which he was a member, the exclusion of a bill showing a sale of goods to the defendant by the alleged owner of the stolen goods after the firm had been dissolved was held to be proper.⁸⁵ For the purpose of showing that the property was stolen before defendant was found in possession of it, an indictment charging another with the theft of the property, and a judgment of conviction of said person for such theft, have been held admissible.⁸⁶ But an acquittal of the alleged thief has been held no defense to the receiver.⁸⁷ The failure of a junk dealer to keep a book, as required by law, wherein all articles purchased by him are to be entered, it has been held, may be shown in a prosecution against him for receiving stolen property.⁸⁸ There is a diversity of opinion in the adjudicated cases as to whether the thief is an accomplice making it necessary under the statutes that his testimony should be

⁷⁹ *Copperman v. People*, 1 Hun (N. Y.) 15.

⁸⁰ *State v. Smith*, 37 Mo. 58.

⁸¹ *People v. Pitcher*, 15 Mich. 397; *McFadden v. State*, 28 Tex. App. 241, 14 S. W. 128.

⁸² *Gunther v. People*, 139 Ill. 526, 28 N. E. 1101.

⁸³ *Turner v. State*, 102 Ind. 425, 1 N. E. 869; *Goodman v. State*, 141 Ind. 35, 39 N. E. 939.

⁸⁴ *McIntire v. State*, 10 Ind. 26.

⁸⁵ *Delahoyde v. People*, 212 Ill. 554, 72 N. E. 732.

⁸⁶ *Cooper v. State*, 29 Tex. App. 8, 13 S. W. 1011, 25 Am. St. 712.

⁸⁷ *State v. Sweeten*, 75 Mo. App. 127.

⁸⁸ *Commonwealth v. Leonard*, 140 Mass. 473, 4 N. E. 96, 54 Am. R. 485.

corroborated in order that the accused may be convicted. Some jurisdictions hold that the thief is not an accomplice,⁸⁹ while some other jurisdictions take the opposite view.⁹⁰ And it has been held that it is a question of fact for the jury.⁹¹ Thus, it has been held error to allow the jury to convict on the uncorroborated testimony of the thief, without leaving to them to find whether such witness was not in fact an accomplice of the accused, so as to require his testimony to be corroborated.⁹² The matter depends largely upon the statute of the particular jurisdiction. The testimony of the one who stole the goods is competent against the one who received them.⁹³ And the owner of the stolen property is a competent witness.⁹⁴ It has been held that the owner of the property may state what the value of the property was to him, as that is a fact slightly tending to show its real value.⁹⁵ Where the defendant was accused of receiving stolen goods, and it was established that he went to a certain house and got a particular package of the goods, evidence of a witness that defendant "knew it was there" was held not objectionable as a conclusion.⁹⁶ The confession of the accused is admissible.⁹⁷ It should be remembered, however, that the confession should be made voluntarily.⁹⁸ And, as elsewhere shown, corroboration may be required. Evidence of the kind of shop kept and conducted by the accused has been held admissible to inform the jury of his habitual occupation and hence the opportunity to commit the crime.⁹⁹ But it has been held, on the other hand, that evidence that the house of the accused is the resort of felons, who resort there to dispose of stolen goods is not admissible.¹⁰⁰ Recent possession, without any evidence that the property stolen had been in the

⁸⁹ *Springer v. State*, 102 Ga. 447, 30 S. E. 791; *State v. Kuhlman*, 152 Mo. 100, 53 S. W. 416, 75 Am. St. 438.

⁹⁰ *State v. Greenburg*, 59 Kans. 404, 53 Pac. 61; *Commonwealth v. Poots*, 18 Phila. (Pa.) 477; *Johnson v. State*, 42 Tex. Cr. App. 440, 60 S. W. 667.

⁹¹ *People v. Kraker*, 72 Cal. 459, 14 Pac. 196, 1 Am. St. 65.

⁹² *People v. Kraker*, 72 Cal. 459, 14 Pac. 196, 1 Am. St. 65.

⁹³ *People v. Levison*, 16 Cal. 98, 76 Am. Dec. 505; *People v. Cook*, 5 Park. Cr. Cas. (N. Y.) 351; *State v. Coppenburg*, 2 Strob. L. (S. Car.) 273.

⁹⁴ *Gassenhelmer v. State*, 52 Ala. 313.

⁹⁵ *Cohen v. State*, 50 Ala. 108.

⁹⁶ *Delahoyde v. People*, 212 Ill. 554, 72 N. E. 732.

⁹⁷ *People v. McKennan*, 35 N. Y. St. 938, 12 N. Y. S. 493; *State v. Habib*, 18 R. I. 558, 30 Atl. 462.

⁹⁸ *State v. Davis*, 125 N. Car. 612, 34 S. E. 198.

⁹⁹ *Commonwealth v. Campbell*, 103 Mass. 436.

¹⁰⁰ *People v. Pierpont*, 1 Wheeler Cr. Cas. (N. Y.) 139. But it might be admissible as already shown, in a proper case, on the question of guilty knowledge.

possession of some person other than the owner before it came to the alleged receiver, or other circumstances to rebut the presumption of larceny has been held to be evidence of larceny rather than evidence of receiving stolen goods.¹⁰¹

§ 3121. **Sufficiency of evidence.**—The bare fact of receiving stolen goods is not sufficient to show knowledge on the receiver's part that the goods were stolen.¹⁰² And proof that the accused had in his possession property twelve months after it was stolen will not sustain a conviction for receiving stolen property, where there is no evidence that the accused knew it to have been stolen.¹⁰³ It has been held, however, that one may be convicted of receiving stolen money upon evidence showing his poverty previous to the larceny, and that shortly thereafter he was in the unexplained possession of a large amount of currency, although such currency is not specifically identified with that which was stolen.¹⁰⁴ So, where the accused was charged with receiving a stolen watch, and admitted that after the theft he had sold a watch of the same number as the stolen watch, such evidence was held sufficient to show that the stolen watch had been in his possession.¹⁰⁵ In a recent case in New York one who had stolen money took it to a bank, the defendant going with him, and delivered it to the bank teller to count. While it was being counted, the defendant, at the instance and with the consent of the thief, made out a deposit slip for the money to his own credit, which was received with the money, the money being placed to the defendant's credit in the bank, and the court held that this constituted receiving stolen money, which, being with knowledge that it was stolen, was a crime under the New York statute.¹⁰⁶ So, where the defendant, knowing goods to have been stolen, put part of them in his bag and helped the thief carry them to a merchant to sell, this was held sufficient to sustain a charge of receiving stolen goods.¹⁰⁷ It has also been held that on a charge of

¹⁰¹ Reg. v. Langmead, 9 Cox Cr. Cas. 464.

¹⁰² Castleberry v. State, 35 Tex. Cr. App. 382, 33 S. W. 875, 60 Am. St. 53. But there are usually other circumstances or the possession may be so recent that knowledge may be inferred under the circumstances.

¹⁰³ Tolliver v. State, 25 Tex. App. 600, 8 S. W. 806.

¹⁰⁴ Jenkins v. State, 62 Wis. 49, 21 N. W. 232.

¹⁰⁵ Gunther v. People, 139 Ill. 526, 28 N. E. 1101.

¹⁰⁶ People v. Ammon, 92 App. Div. (N. Y.) 205, 87 N. Y. S. 358, aff'd in, 71 N. E. 1135.

¹⁰⁷ State v. Rushing, 69 N. Car. 29. But this comes close to the line of larceny or aiding and abetting the

receiving stolen goods belonging to a corporation, it is sufficient to prove that they were owned by a corporation de facto.¹⁰⁸ But where the indictment charged the receipt of a certain number of ounces of silver, knowing it to have been stolen, and the proof was that the silver had been so far manufactured into the form of forks and spoons as to bear a resemblance at least to the finished product, and these forms were distinctively known as fork blanks and spoon blanks, it was held that the evidence did not sustain the indictment.¹⁰⁹

same. See, *Reg. v. Coggins*, 12 Cox Cr. Cas. 517; *Smith v. State*, 59 Ohio St. 530, 52 N. E. 826.

¹⁰⁸ *State v. Nelson*, 27 R. I. 31, 60 Atl. 589. Compare *Reg. v. Mansfield*, Car. & Mar. Rep. 140.

¹⁰⁹ *Butler v. State*, 35 Fla. 246, 17 So. 551.

CHAPTER CLI.

RIOTS AND UNLAWFUL ASSEMBLIES.

Sec.	Sec.
3122. Meaning of terms.	3126. Proof as to participation.
3123. Presumptions and burden of proof.	3127. Proof as to terror of the people.
3124. Order of proof.	3128. Evidence in general.
3125. Number of persons at least three.	

§ 3122. **Meaning of terms.**—A riot is defined as a “tumultuous disturbance of the peace by three persons or more assembling together of their own authority, with an intent mutually to assist each other against any who shall oppose them in the execution of some enterprise of a private nature, and afterward actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful.”¹ An unlawful assembly at common law is the meeting together of three or more persons, to the disturbance of the public peace, and with the intention of co-operating in the forcible and violent execution of some unlawful private enterprise. If they take steps toward the performance of their purpose it becomes a rout, and if they put their design into actual execution it is a riot.² If they part without doing it and without taking such steps it is merely an unlawful assembly.³ Again, riot has been defined as a tumultuous disturbance of the peace, by three or more persons assembling together of their own authority, with an intent to assist one another against any one who shall oppose them in the execution of some enterprise of a private nature, and afterward actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act itself be lawful or unlawful.⁴ Under the Georgia statute, which provides that if two or more per-

¹ Black's L. Dict.

² Black's L. Dict.

³ 3 Greenleaf Ev., § 216.

⁴ State v. Russell, 45 N. H. 83; May

Cr. Law. As to riotous conspiracy see, Spies v. People, 122 Ill. 1, 12 N. E. 865, 3 Am. St. 320, and note.

sons do an unlawful act of violence or any other act in a violent and tumultuous manner, they shall be guilty of a riot, it is held that there must be concert of action on the part of such persons in furtherance of a common intent,⁵ but that while there must be a common intent on the part of two or more persons to do an unlawful act, and also concert of action in furtherance of such intent, it is not necessary that there must have been a previous plot on the part of the rioters in order to constitute such offense.⁶ In Indiana it has been held unnecessary to prove that the defendants were engaged in doing an act which of itself was unlawful.⁷ And in the same state it is also held that the violent and tumultuous manner in which the act is done is the essence of the offense, and gathering together in a crowd for the purpose of giving a newly wedded couple a charivari, and making a great noise by shouting, shooting off firearms, blowing horns and beating on tin pans may constitute a riot,⁸ although all the rioters were in a good humor,⁹ and it is not necessary to show that anybody was terrified by the tumult.¹⁰

§ 3123. Presumptions and burden of proof.—It has been held that the mere fact that three or more persons in a violent manner beat another does not raise the presumption of law that they assembled with that intent, or, after being assembled, agreed mutually to assist one another in executing such purpose.¹¹ But from the doing of the act, accompanied by declarations of an intent to do it, the jury may infer a previous intent and agreement to do it, and mutually to assist each other in doing it; and it is said that in the absence of all contra-

⁵ *Coney v. State*, 113 Ga. 1060, 39 S. E. 425; *Stafford v. State*, 93 Ga. 207, 19 S. E. 50; *Prince v. State*, 30 Ga. 27. It is also said that the mere making of a noise will not constitute a riot in the absence of violence. *Barron v. State*, 74 Ga. 833.

⁶ *Jemley v. State*, (Ga.) 49 S. E. 292.

⁷ *Kiphart v. State*, 42 Ind. 273; see also, *State v. Voshall*, 4 Ind. 589; *State v. Dillard*, 5 Blackf. (Ind.) 365; *People v. O'Loughlin*, 3 Utah 133, 1 Pac. 653; *State v. Blair*, 13 Rich. L. (S. Car.) 93; *Jacobs v.*

State, 20 Ga. 839; *Reg. v. Cunningham*, 16 Cox Cr. Cas. 420, 427.

⁸ *Bankus v. State*, 4 Ind. 114; *State v. Brown*, 69 Ind. 95.

⁹ *Bankus v. State*, 4 Ind. 114.

¹⁰ *Bankus v. State*, 4 Ind. 114; *Thayer v. State*, 11 Ind. 287; see also, *Commonwealth v. Runnels*, 10 Mass. 518; *People v. O'Loughlin*, 3 Utah 133, 1 Pac. 653 (strikers marching through street held rioters); *Darst v. People*, 51 Ill. 286; *State v. York*, 70 N. Car. 66; *State v. Boies*, 34 Me. 235.

¹¹ *State v. Kempf*, 26 Mo. 429.

dictory evidence they ought so to infer.¹³ And it is held that proof of an agreement or proposal to do the unlawful act need not be made,¹³ and that it is sufficient if there is a common intent or purpose and concert of action without any previous plot.¹⁴ The burden of proof is on the prosecution to establish that at least three persons were engaged in the unlawful act.¹⁵ And the burden of proof is generally on the prosecution to establish an unlawful assembly. But an assembly that might not have been unlawful in the first instance,¹⁶ if it had been properly conducted, may become unlawful.¹⁷ It has also been held that it must be shown that the object of the rioters was of a private nature,¹⁸ and the common intent or purpose must be shown,¹⁹ but it may be inferred from conduct and other circumstantial evidence.²⁰

§ 3124. Order of proof.—In proving the guilt of the defendants, says Greenleaf, “the regular and proper order is similar to that which is adopted in prosecutions for conspiracy; namely, first to prove the combination, and then to show what was done in pursuance of the unlawful design.” But this rule is not imperative, and the court, in its discretion may admit evidence out of its usual and regular order.²¹

¹³ United States v. Stockwell, 4 Cranch (U. S.) 671.

¹⁴ United States v. Stockwell, 4 Cranch (U. S.) 671; United States v. Fenwick, 4 Cranch (U. S.) 675. But there must be a common purpose of doing it. Aron v. Wausau, 98 Wis. 592, 74 N. W. 354.

¹⁵ Jemley v. State, (Ga.) 49 S. E. 292.

¹⁶ Commonwealth v. Berry, 5 Gray (Mass.) 93; State v. Bailey, 3 Blackf. (Ind.) 209; 3 Greenleaf Ev., §§ 216, 217. Two or more under the Georgia statute.

¹⁷ Commonwealth v. Runnels, 10 Mass. 518; State v. Stalcup, 1 Ired. L. (N. Car.) 30, 35 Am. Dec. 732; Reg. v. Soley, 2 Salk. 594, 11 Mod. 115; but see, Dougherty v. People, 5 Ill. 179.

¹⁸ United States v. McFarland, 1 Cranch (U. S.) 140; State v. Johnson, 89 Iowa 594, 57 N. W. 302; State

v. Snow, 18 Me. 346; Lycoming F. Ins. Co. v. Schwenk, 95 Pa. St. 89, 40 Am. R. 629; State v. Cole, 2 McCord L. (S. Car.) 117, 120; Blackwell v. State, 30 Tex. App. 672, 18 S. W. 676; see, Commonwealth v. Martin, 7 Pa. Dist. 219.

¹⁹ Douglass v. State, 6 Yerg. (Tenn.) 525; 3 Greenleaf Ev., § 220.

²⁰ See, State v. McBride, 19 Mo. 239; State v. Kempf, 26 Mo. 429; Dixon v. State, 105 Ga. 794, 31 S. E. 750; Aron v. Wausau, 98 Wis. 592, 74 N. W. 354; Commonwealth v. Gibney, 2 Allen (Mass.) 150.

²¹ Commonwealth v. Gibney, 2 Allen (Mass.) 150; United States v. Stockwell, 4 Cranch (U. S.) 671; United States v. Fenwick, 4 Cranch (U. S.) 675.

²² 3 Greenleaf Ev., § 221; see also, Nicholson's Case, 1 Lewin C. C. 300; 1 East P. C. 96, § 37; Redford v. Birley, 3 Stark. 76.

§ 3125. **Number of persons, at least three.**—It must be proved that least three persons were engaged in the unlawful act.²³ Otherwise the offense is not made out.²³ So it has been held that if the evidence extends only to one or two persons, all the defendants must be acquitted of the charge of riot, though the act proved against one or two might be an assault or some similar offense.²⁴ Thus, it has been held that riot is a joint offense, and that the evidence must show that at least three²⁵ of the persons charged participated in the alleged riot, or none of them can be convicted.²⁶ It has been held not enough to prove that persons not indicted for the riot took part in it.²⁷ But in the same jurisdiction where the indictment charged the defendants, and other persons to the grand jury unknown, with having committed a riot, proof that defendants and unknown persons to the number of three participated in the offense was held sufficient to justify a conviction of the defendants.²⁸

§ 3126. **Proof as to participation.**—Participation by persons present at an unlawful assembly may generally be proved by evidence of their presence, and any conduct on their part indicating that they adopted the language and conduct of the others or were under the influence of similar sentiments.²⁹ Evidence of a refusal to obey a lawful order to disperse is regarded as showing participation, because the mere presence of persons in an unlawful assembly encourages and strengthens those who are actively bent on mischief.³⁰ It will be sufficient to establish the guilt of any defendant, if it be shown that he joined himself to the others after the riot began, or encouraged them or otherwise took part in their proceedings.³¹ It is not necessary to establish that when the parties first met they assembled unlawfully, for an originally lawful assemblage may be converted into a riot.³²

²³ Commonwealth v. Berry, 5 Gray (Ind.) 72; Hardebeck v. State, 10 (Mass.) 93; Rex v. Sudbury, 1 Ld. Ind. 459.
Raym. 484; Rex v. Scott, 3 Burr. 1262. Two in Georgia. Stafford v. State, 93 Ga. 207.

²⁴ State v. Bailey, 3 Blackf. (Ind.) 209.

²⁵ State v. Kuhlmann, 5 Mo. App. 588; Turpin v. State, 4 Blackf. (Ind.) 72.

²⁶ 3 Greenleaf Ev. (16th ed.), §§ 216, 216.

²⁷ State v. Bailey, 3 Blackf. (Ind.) 209; Turpin v. State, 4 Blackf.

²⁸ Hardebeck v. State, 10 Ind. 459.

²⁹ Turpin v. State, 4 Blackf. (Ind.) 72.

³⁰ People v. Most, 128 N. Y. 108, 27 N. E. 970, 26 Am. St. 458.

³¹ Riots of 1844, In re, 2 Pa. L. J. 275, 279, 4 Pa. L. J. 29, 32.

³² People v. White, 55 Barb. (N. Y.) 606, 612; Rex v. Royce, 4 Burr. 2073, 1 Hale P. C. 65, § 89.

³³ State v. Snow, 18 Me. 346.

It has been held to be unnecessary to establish that every defendant was present at the original assemblages. Thus, one joining others already engaged in a riot is equally guilty with the others.³³ And persons who have lawfully assembled and afterward do an unlawful act of violence in a tumultuous manner are guilty of riot.³⁴ "All who join an unlawful assembly, disregarding its probable effect, and the alarm and consternation likely to ensue, and all who give countenance and support to it, are criminal parties."³⁵ But evidence that the defendant came up just after the riot was over and did acts, which, if done in conjunction with others, might have amounted to a riot, does not prove him guilty of the offense.³⁶

§ 3127. **Proof as to terror of the people.**—It has been held unnecessary to expressly prove that the deed was done to the terror and disturbance of the people,³⁷ and where the indictment charges and the evidence shows the actual perpetration of a deed of violence, such as an assault and battery, the pulling down of a building or the like, it will usually be sufficient.³⁸ But where the offense consists in tumultuously disturbing the peace without perpetration of any deed of violence it is held necessary to prove that the conduct was to the disturbance and terror of the people.³⁹ "The violence necessary to constitute a riot need not be actually inflicted upon any person. Threatening with pistols, or clubs, or even by words or gestures to injure if interfered with in the prosecution of the unlawful purpose, or any other demonstration calculated to strike terror and disturb the public peace is a sufficient violence to constitute the assembly riotous. So, where several attempt, by threat and menace, to rescue a lawful prisoner, they

³³ *State v. Brazil, Rice* (S. Car.) 257.

³⁴ *Commonwealth v. Runnels*, 10 Mass. 518; *Kiphart v. State*, 42 Ind. 273.

³⁵ *Williams v. State*, 9 Mo. 270.

³⁶ *Sloan v. State*, 9 Ind. 565. And in several other cases mere presence, without some act on the part of the accused or evidence of his countenance or support, has been held insufficient. *State v. McBride*, 19 Mo. 239; *Reg. v. Atkinson*, 11 Cox Cr. Cas. 330.

³⁷ *State v. Sims*, 16 S. Car. 486, 490.

³⁸ *Bankus v. State*, 4 Ind. 114; *Thayer v. State*, 11 Ind. 287.

³⁹ *Commonwealth v. Runnels*, 10 Mass. 518; *State v. Brooks*, 1 Hill (S. Car.) 362. And that the defendants knew or should have known that their acts were likely to lead to a breach of the peace. *Reg. v. Clarkson*, 66 L. T. N. S. 297. Proof that one person was terrified held sufficient. *Reg. v. Langford*, Car. & M. 602; *Reg. v. Phillips*, 2 Moody C. C. 252.

are guilty of a riot. Indeed, it has been held that a trespass to property in the presence of a person in actual possession, though there is no actual force, amounts to a riot. The disturbance of the peace by exciting terror, is the gist of offense. To disturb another in the enjoyment of his lawful right is a trespass, which, if done by three or more persons unlawfully combined, with noise and tumult, is a riot; as the disturbance of a public meeting or making a great noise and disturbance at a theater for the purpose of breaking up the performance, though without offering personal violence to any one; or even going in the night upon a man's premises and shaving his horse's tail, if it be done with so much noise and of such a character as to rouse the proprietor and alarm his family. Violent threatening and forcible methods of enforcing rights, whether public or private, are not lawful."⁴⁰ Testimony of a general feeling of alarm and disquiet has been held properly received to show that the defendant disturbed the public peace.⁴¹

§ 3128. Evidence in general.—What is said and done by persons during the time they are engaged in a riot constitutes the *res gestae*, and it is, of course, competent as a rule to prove all that is said and done. If the violent or disorderly conduct of the rioters results in injury to property, and the act of causing the injury is committed during the riot, the state may prove the act which caused the injury. This evidence is not admitted for the purpose of establishing another offense, but because it is a part of the occurrence which constitutes the riot and tends to show that the conduct of the defendants was riotous and violent.⁴² It has been held that upon a trial for a riot, evidence might be received to show that the defendants were members of the same secret society.⁴³ In an indictment for a riot and breaking into an outhouse, proof that the house was within the curtilage, and that the door was broken in a riotous manner without any demand or refusal to admit has been held competent testimony under a count for a riot,

⁴⁰ May Cr. Law, § 166; see also, 518; *State v. Brazil, Rice* (S. Car.) 257; *State v. Alexander*, 7 Rich. L. 462; *State v. Jackson*, 1 Speer (S. Car.) 13; *Bell v. Mallory*, 61 Ill. 167; *Fisher v. State*, 78 Ga. 258; *State v. Fisher*, 1 Dev. (N. Car.) 504; *State v. Renton*, 15 N. H. 169; *State v. Brooks*, 1 Hill (S. Car.) 362; *State v. Townsend*, 2 Harr. (Del.) 543; *Commonwealth v. Runnels*, 10 Mass. 566; *State v. Johnson*, 43 S. Car. 123, 20 S. E. 998.

⁴¹ *People v. O'Loughlin*, 3 Utah 133, 1 Pac. 653.

⁴² *Gallaher v. State*, 101 Ind. 411; see also, *Rex v. Hunt*, 3 B. & Ald. 566.

⁴³ *State v. Johnson*, 43 S. Car. 123, 20 S. E. 998.

and admissible in aggravation of the offense, although there is no count charging a breaking into a house, within the curtilage.⁴⁴ It has been held, however, that it may not be shown that the defendant had been engaged in riotous proceedings in former years.⁴⁵ That is, evidence of riotous assemblage in former years is incompetent, either as tending to rebut the defense that the assemblage in question was of a peaceful character or as tending in the first instance to characterize the assemblage in question.⁴⁶ Where defendants' witnesses had testified that they were of the party concerned in the riot, they were not allowed to give evidence of their intentions in meeting.⁴⁷ In an indictment for a riot and forcible trespass in entering a man's dwelling-house, he being in the actual possession thereof, and taking from his possession slaves and other personal property, it has been held that it is unnecessary to show that the prosecutor had the right to the property or the right to the possession, but whether he had in fact the possession thereof at the time when that possession was charged to have been invaded with such lawless violence, and any evidence tending to establish that possession is admissible.⁴⁸ And under an indictment for riot, whereby a mill-dam was destroyed, it is only necessary to prove the possession of the prosecutor.⁴⁹ It has been held that an allegation that some of the rioters are unknown need not be proved⁵⁰ and even where the act charged to have been violently and tumultuously done was an attempt to commit an assault it is not necessary to allege or prove that the defendants had the present ability to inflict an injury on the prosecuting witness.⁵¹ And it has been held that under an indictment for a riot a conviction for an assault,⁵² an unlawful assembly, or a rout may be had.⁵³ And a conviction for assault and battery has been held, in other jurisdictions, to be no bar to a prosecution for a riot.⁵⁴ It has been said, however, that where the

⁴⁴ *Douglass v. State*, 6 Yerg. (Tenn.) 525.

⁴⁵ *State v. Renton*, 15 N. H. 169; *Commonwealth v. Campbell*, 7 Allen (Mass.) 541, 83 Am. Dec. 705.

⁴⁶ *State v. Renton*, 15 N. H. 169; see also, *Reg. v. Mailloux*, 16 New Br. 493, 499.

⁴⁷ *United States v. Dunn*, 1 Cranch (U. S.) 165.

⁴⁸ *State v. Bennett*, 4 Dev. & B. (N. Car.) 43.

⁴⁹ *State v. Wilson*, 23 N. C. 32.

⁵⁰ *State v. Blair*, 13 Rich. L. (S. Car.) 93.

⁵¹ *State v. Acra*, 2 Ind. App. 384, 28 N. E. 570.

⁵² *Shouse v. Commonwealth*, 5 Pa. St. 83; *Rex v. Hemings*, 2 Show. 93; but see, *Ferguson v. People*, 90 Ill. 510.

⁵³ *State v. Sumner*, 2 Speers L. (S. Car.) 599, 42 Am. Dec. 387; see also, *Rex v. Cox*, 4 Car. & P. 538, 19 E. C. L. 638.

⁵⁴ *Freeland v. People*, 16 Ill. 380;

gravamen of a riot consisted of an assault and battery, a conviction for that offense will bar a prosecution for riot, but, where the assault and battery was merely incidental to the riot, then a conviction for the former offense will not necessarily bar a prosecution for the latter.⁵⁵

see also, *Ferguson v. People*, 90 Ill. Mass. 454, 8 N. E. 324; *State v. 510*; *State v. Russell*, 45 N. H. 83; *Townsend*, 2 Harr. (Del.) 543. but compare, *State v. Ham*, 54 Me. " *Wininger v. State*, 13 Ind. 540; 194; *Commonwealth v. Hall*, 142 *Greenwood v. State*, 64 Ind. 250.

CHAPTER CLII.

ROBBERY.

Sec.	Sec.
3129. Definition and elements.	3135. Evidence of value.
3130. Presumptions—Ownership from possession.	3136. Recent possession of stolen property.
3131. Presumptions—Fear and other presumptions.	3137. Evidence of other offenses.
3132. Intent.	3138. Circumstantial evidence.
3133. Identity of accused.	3139. Circumstantial evidence—Corroboration.
3134. Res gestae.	3140. Defenses.

§ 3129. **Definition and elements.**—Robbery may be defined in a general way as a felonious taking of property from the person of another by force.¹ The force necessary may, however, be either actual or, in a sense, constructive. Thus, robbery may be accomplished, in most jurisdictions, by threats or putting the person robbed in fear and overcoming his will.² And it is defined in substance by many statutes as the felonious taking of personal property from the person or in the presence of another, against his will, by means of force or fear.³ The offense is distinguished from larceny largely by the elements of force or putting in fear,⁴ and evidence of the mere snatching of prop-

¹ See 4 Blackstone Comm. 242; Harris Cr. Law (Forces' ed.) 177; 2 Abbott L. Dict. 436; United States v. Jones, 3 Wash. (U. S.) 209; Rex v. Donolly, 2 East P. C., chap. 16, § 129, cited in, Breckinridge v. Commonwealth, 97 Ky. 267, 30 S. W. 643, and State v. Brown, 113 N. Car. 645, 18 S. E. 51.

² Rains v. State, 137 Ind. 83, 36 N. E. 532; Duffy v. State, 154 Ind. 250, 56 N. E. 209; Arnold v. State, 52 Ind. 281, 21 Am. R. 175; Keeton v. State, 70 Ark. 163, 66 S. W. 645; 3 Greenleaf Ev., § 231; Clary v. State,

33 Ark. 561; State v. Howerton, 58 Mo. 581; Dill v. State, 6 Tex. App. 113; Foster's Cr. Law 128, 2 East P. C. 711.

³ See, People v. Modina, (Cal.) 79 Pac. 842; People v. Foley, 9 N. Y. St. 34; Rains v. State, 137 Ind. 83, 36 N. E. 532; McDaniel v. State, 16 Miss. 401; State v. Lawler, 130 Mo. 366, 32 S. W. 979, 51 Am. St. 575; State v. Davis, (Utah) 76 Pac. 705.

⁴ "The distinction of robbery from other kinds of larceny," says Mr. Harris, "is, that in the former case there must have been a felonious

erty from another without violence or putting in fear tends to prove larceny rather than robbery.⁵ So, obtaining money by extortion, false pretenses or other trick, unaccompanied by violence or putting in fear, will not amount to robbery.⁶ But snatching a watch or purse from another with such violence as to break a chain by which it is secured,⁷ or snatching an earring with such force as to make the ear bleed⁸ has been held sufficient force or violence to constitute robbery so far as that essential element is concerned. So, where the defendant had bound the prosecuting witness and put her in fear so that information as to the place where she kept her money and watch was extorted from her, and the defendant, leaving her bound, took the property, this was held sufficient to support a conviction for robbery, notwithstanding the property was not attached to her person and the defendant had to go into another room to get it.⁹

taking from the person, or in the presence of another, accompanied either by violence or a putting in fear." Harris Cr. Law (Forces' ed.) 212. See, Long v. State, 12 Ga. 293.

⁵ McCloskey v. People, 5 Park Cr. Cas. (N. Y.) 299; People v. Hall, 6 Park Cr. Cas. (N. Y.) 642; People v. McGinty, 24 Hun (N. Y.) 62; Bon-sall v. State, 35 Ind. 460; see also, Mahoney v. People, 5 Thomp. & C. (N. Y.) 329; Norris' Case, 6 City Hall Rec. (N. Y.) 86; Fanning v. State, 66 Ga. 167; Spencer v. State, 106 Ga. 692, 32 S. E. 849; but see, Williams v. Commonwealth, 20 Ky. L. R. 1850, 50 S. W. 240; Snyder v. Commonwealth, 21 Ky. L. R. 1538, 55 S. W. 679.

⁶ Perkins v. State, 65 Ind. 317; Huber v. State, 57 Ind. 341; see also, James v. State, 53 Ala. 380; Shinn v. State, 64 Ind. 13, 31 Am. R. 110; Routt v. State, 61 Ark. 594, 597; Doyle v. State, 77 Ga. 513; State v. Deal, 64 N. Car. 270, 276. Where the owner of the property was drunk and there was no violence or putting in fear, it was held no robbery

in, Hall v. People, 171 Ill. 540, 49 N. E. 495.

⁷ Smith v. State, 117 Ga. 320, 43 S. E. 736, 97 Am. St. 165; Rex v. Mason, 2 Leach C. C. 548; State v. Broderick, 59 Mo. 318; State v. McCune, 5 R. I. 60, 70 Am. Dec. 176, and note; Jones v. Commonwealth, 112 Ky. 689, 66 S. W. 633, 57 L. R. A. 432, and note, 99 Am. St. 330; but compare, Bowlin v. State, (Ark.) 81 S. W. 838.

⁸ Rex v. Lapler, 1 Leach C. C. 360, 2 East P. C. 557; see also, State v. Perley, 86 Me. 427, 30 Atl. 74; Rex v. Moore, 1 Leach C. C. 354; see for other instances, Seymour v. State, 15 Ind. 288; Hughes' Case, 1 Lewin C. C. 301.

⁹ State v. Calhoun, 72 Iowa 432, 34 N. W. 194, 2 Am. St. 252; see also, 2 Bishop Cr. Law, § 975; Wharton Cr. Law, § 1696; Clements v. State, 84 Ga. 660, 11 So. 505, 20 Am. St. 385; but see, Crews v. State, 3 Coldw. (Tenn.) 350; State v. Freels, 3 Humph. (Tenn.) 228; see generally, Hill v. State, 42 Neb. 503, 60 N. W. 916; Turner v. State, 1 Ohio St. 422.

§ 3130. Presumptions — Ownership from possession.—Possession of the property by the prosecuting witness at the time it was taken is said to be presumptive evidence of ownership in him.¹⁰ In other words, as the rule is often stated, where money or other property is taken from a party by robbery, the party from whom such property was taken is *prima facie* the owner,¹¹ as against the robber. Indeed, while some of the cases seem to hold that the person from whom the goods are taken must be either the general or special owner or have such an interest as would entitle him to maintain an action for taking them from his custody,¹² yet several of these cases have been overruled, and it is said that it is not essential that the property should belong to the person robbed.¹³ The contention to the contrary, it is said, is a mere technicality and to sustain it would be manifestly against the reason of the law and constitute an obstruction to justice.¹⁴ The subject is thoroughly reviewed in a recent case in which it was held that a clerk having possession of his employer's money had sufficient ownership to support an allegation of ownership in him in an indictment for robbery, and below we quote from the opinion at some length.¹⁵

¹⁰ *People v. Oldham*, 111 Cal. 648, 44 Pac. 312; *People v. Becker*, 48 Mich. 43, 11 N. W. 779; *State v. Howard*, (Mont.) 77 Pac. 50.

¹¹ *People v. Oldham*, 111 Cal. 648, 44 Pac. 312; *State v. Adams*, 58 Kans. 365, 49 Pac. 81; *Bow v. People*, 160 Ill. 443, 43 N. E. 593; *Durand v. People*, 47 Mich. 332, 11 N. W. 184; *People v. Hicks*, 66 Cal. 105, 4 Pac. 1093; *Morris v. State*, 84 Ala. 446, 4 So. 912; *People v. Nelson*, 56 Cal. 77; *State v. Hobgood*, 46 La. Ann. 855, 15 So. 406; see, *State v. Montgomery*, 181 Mo. 19, 79 S. W. 693, 67 L. R. A. 343.

¹² See *State v. Morledge*, 164 Mo. 522, 65 S. W. 226; *State v. Lawler*, 130 Mo. 366, 32 S. W. 979, 51 Am. St. 575; *Hughes v. Commonwealth*, 17 Gratt. (Va.) 565, 94 Am. Dec. 498; *Commonwealth v. Williams*, 7 Gray (Mass.) 337; *East P. C.*, § 90.

¹³ *State v. Montgomery*, 181 Mo. 19, 79 S. W. 693 (overruling the Mis-

souri cases cited in last preceding note); *Brooks v. People*, 49 N. Y. 436, 10 Am. R. 398; *State v. Adams*, 58 Kans. 365, 49 Pac. 81.

¹⁴ Case and Comment, No. 1, June, 1905.

¹⁵ "Is it the law that, if the president or cashier of a bank should be temporarily absent from the bank, a robber may with impunity enter the bank, and present a revolver or gun at the clerks left in charge, and take all the money of the bank, and escape punishment for robbery? Or, to state it differently, if a gentleman confide to his friend his watch, for convenience, and, after they part, a robber places his revolver at the friend's head, and, by putting him in fear, takes the watch, there can be no robbery, because the real owner was not present, and was not put in fear, and, as the friend was not a bailee for hire, and makes no claim of any property rights, other

§ 3131. **Presumptions—Fear and other presumptions.**—It is said by Professor Greenleaf that: "Evidence that the money or goods were obtained from the owner by putting him in fear, will support the allegation that they were taken by force. And the law, in odium spoliatoris, will presume fear, wherever there appears a just ground for it. The fear may be of injury to the person; or, to the property; or, to the reputation; and the circumstances must be such as to indicate a felonious intention on the part of the prisoner. The fear, also, must be shown to have continued upon the party up to the time when he parted with his goods or money; but it is not necessary to prove any words of menace, if the conduct of the prisoner were sufficient without them; as, if he begged alms with a drawn sword; or, by similar intimidation, took another's goods under color of a purchase, for half their value, or the like. It is only necessary to prove that the fact was attended with those circumstances of violence or terror, which,

than his possession, therefore the ownership cannot be laid in him. The question is one of much practical moment. This identical question arose in *Brooks v. People*, 49 N. Y. 436, 10 Am. R. 398, on a statute couched in the exact words of our statute, and it was ruled by the Court of Appeals of New York that, as against a robber, the person robbed was the owner of the goods in his possession and custody, whereof he was robbed. Judge Peckham in that case traced the history of this section in the New York Code, and found that the revisers had said they defined robbery according to 2 East P. C., chap. 16, §§ 125-129; the material ingredient in this offense being that it is done against the will, by violence or by fear of immediate injury to the person. The learned judge pointed out that the elementary common-law writers generally did not insert in their definition of this crime that the property should belong to the person robbed. 1 Hale P. C. 532; 4 Blackstone Comm. 241; 2 Russell Crimes (4th ed.) 98; Page Mar. 867;

Hawkins, 95 C. 34; *Commonwealth v. Clifford*, 8 Cush. (Mass.) 215. The conclusion was reached that, as against a robber, the possession was sufficiently laid in the person robbed. The same question again arose on a statute in the same words in *State v. Adams*, 58 Kaps. 365, 49 Pac. 81, and the court very aptly says: "The characteristic of robbery, distinguishing it from other forms of larceny, lies in the violence inflicted on the person of one in possession of the property, or in putting him in fear of injury to his person. So far as the mere taking is concerned, the offense is neither greater nor less if filched in any other way. The gravity of the offense lies in the breach of the peace, in the personal violence inflicted, or the terror excited in the mind of the individual robbed. At the common law it was never held that the property belonged to the person robbed. It was sufficient that the property belonged to the person robbed or some third person." *State v. Montgomery*, 181 Mo. 19, 79 S. W. 698, 67 L. R. A. 343, and note.

in common experience, are likely to induce a man unwillingly to part with his money for the safety of his person, property or reputation."¹⁶ Thus, it has been held that actual fear need not be strictly proved, and that if the taking be under such circumstances as would ordinarily create an apprehension of danger in the mind of a man of ordinary experience, and cause him to give up his property, such evidence will be admissible and may be sufficient proof of this element of robbery.¹⁷ In a recent case a witness was permitted to testify that he was the city electrician and knew of the electric lights at a certain place in question, that no report came in from there at the time in question, and that reports were not made unless the light went out. This was held proper as indirect evidence under the California statute, in accordance with the presumption that the ordinary course of business was followed.¹⁸

§ 3132. Intent.—Circumstances which show that the accused forcibly or by intimidation and putting in fear, took the property from the owner without his consent, intending to deprive him of it and convert it to his own use, may be shown, and the intent of the accused to rob may be inferred from such acts and circumstances.¹⁹ When the taking of the property has been proved, the felonious intent may be inferred from the circumstances and appropriation of the property.²⁰ The intent, however, it is said, is not necessarily to be inferred from the act done, but must be established from the circumstances surrounding the act, and the investigation may extend beyond the *res gestae*.²¹ To constitute the crime of robbery, the taking must

¹⁶ 3 Greenleaf Ev., § 231. But while there may be such an inference or, perhaps, presumption of fact, it may be too strong a statement to say that the law itself presumes fear. In several cases, however, it is said that the law presumes fear where there appears to be a just ground for it, even though there was no actual fear. *Jones v. State*, (Tex. Cr. App.) 88 S. W. 217; *Long v. State*, 12 Ga. 293.

¹⁷ *Long v. State*, 12 Ga. 293; *Williams v. State*, 51 Neb. 711, 71 N. W. 729; *Pickrel v. Commonwealth*, 17 Ky. L. R. 120, 30 S. W. 617. The

prosecuting witness may testify that he was scared. *Long v. State*, 12 Ga. 293.

¹⁸ *People v. Kelly*, (Cal.) 79 Pac. 846.

¹⁹ *State v. Woodward*, 131 Mo. 369, 33 S. W. 14; *People v. Hughes*, 11 Utah 100, 39 Pac. 492.

²⁰ *Jordan v. Commonwealth*, 25 Gratt. (Va.) 943, 948; *Long v. State*, 12 Ga. 293; see also, *Jones v. State*, (Tex. Cr. App.) 88 S. W. 217.

²¹ *State v. Glover*, 10 Nev. 24; see also, *Ogden v. People*, 134 Ill. 599, 25 N. E. 755; *State v. Howard*, (Mont.) 77 Pac. 50.

be *animo furandi*, and evidence tending to rebut the felonious intent is admissible.²² It is for the jury to determine, from all the circumstances whether the acts of the accused were committed with intent to rob, or for some other purpose.²³ Evidence which shows a concealment of the property may be admissible as tending to show the felonious intent.²⁴

§ 3133. Identity of Accused.—The identity of the defendant must be established by evidence. But the evidence may be circumstantial as well as direct. The circumstances of each case must generally be weighed and determined by the jury.²⁵ But where there was strong evidence of an alibi and the only evidence tending to connect the defendant with the crime was the opinion of the person robbed that the defendant was of the form and size of one of the robbers, it was held that the defendant's motion for a new trial, after verdict of guilty, should have been sustained.²⁶ In another case, however, where the robbery was by masked men, it was held that evidence of identification mainly by the voice was sufficient.²⁷ So, in a recent case, after proof that a certain person was an accomplice of the defendant in the robbery, testimony that such person, who had lived in the house of the witness for several months, was last seen by him an hour after the robbery and that he was then in the house, with a person whose voice the witness recognized as that of the defendant, was held admissible.²⁸

§ 3134. Res Gestae.—Statements made at the time of the act are generally admissible as part of the *res gestae* and circumstances and acts of the defendant may sometimes be shown even if extending beyond the immediate *res gestae*.²⁹ Unsworn statements of the victim of the robbery, which were made in the absence of the accused several hours after the alleged robbery, although explanatory of the transac-

²² *State v. Hollyway*, 41 Iowa 200, 20 Am. R. 586.

²³ *People v. Woody*, 48 Cal. 80.

²⁴ *State v. Deal*, 64 N. Car. 270.

²⁵ *Ogden v. People*, 134 Ill. 599, 25 N. E. 755; *Usom v. State*, 97 Ga. 194, 22 S. E. 399; *State v. Slpult*, 81 Iowa 40, 46 N. W. 748; *State v. Callohon*, 96 Iowa 304, 65 N. W. 150; *State v. Moore*, 106 Mo. 480, 17 S. W. 658.

²⁶ *State v. Campbell*, 69 Iowa 556, 29 N. W. 604.

²⁷ *Ogden v. People*, 134 Ill. 599, 25 N. E. 755.

²⁸ *Commonwealth v. Kelly*, 186 Mass. 403, 71 N. E. 807.

²⁹ *State v. Glover*, 10 Nev. 24; see also, *Bow v. People*, 160 Ill. 438, 43 N. E. 593; *State v. Howard*, (Mont.) 77 Pac. 50; *Rex v. Rooney*, 7 Car. & P. 517, 32 E. C. L. 736; *Rex v. Winkworth*, 4 Car. & P. 444, 19 E. C. L. 594.

tion have, however, been held to be hearsay and not admissible in evidence.³⁰ And a similar ruling was made, where the declarations of the prosecuting witness were made a few minutes after the alleged robbery at a place about two squares from the scene of the transaction.³¹ Other courts, also have rejected such declarations at least as to the details of the complaint.³² But outcry declarations in the pursuit of the robber or attempt to arrest him have been admitted,³³ and the fact of a complaint being at once made by the person robbed has also been held competent.³⁴ There is some reason for admitting the fact of the recent complaint, or allowing the reason for not making it to be explained in order to repel an adverse inference, as in rape cases, but on this theory the fact of the complaint only, is admissible and not the details.³⁵ It might be also that such complaint, and perhaps the details, would be admissible on the theory of rehabilitating a witness by showing prior consistent statements where the victim had testified and the defendant had sought to impeach him as having recently fabricated his story. But the American cases do not seem to proceed on any definite theory, even where they admit such evidence, except that it is generally conceded that it should be admitted if part of the *res gestae*. Some of the decisions hold that it is not admissible, ordinarily at least, if not part of the *res gestae*, while others seem to admit it in some other instances but do not clearly show upon just what theory it is held competent.

§ 3135. Evidence of value.—In general the value of the article taken must be proved, or it must at least appear to have some value, but under an indictment for taking money, it is not necessary to prove its value, as money is the measure of values.³⁶ The accused may be guilty of robbery even if the property be of the smallest value.³⁷

³⁰ *Moses v. State*, 88 Ala. 78, 7 So. 101, 16 Am. St. 21.

³¹ *Shoecraft v. State*, 137 Ind. 433, 36 N. E. 1113.

³² See, *Bolling v. State*, 98 Ala. 80, 12 So. 782; *Brooks v. State*, 96 Ga. 353, 23 S. E. 413; *Jones v. Commonwealth*, 86 Va. 743, 10 S. E. 1004.

³³ *Bow v. People*, 160 Ill. 438, 43 N. E. 593; *State v. Driscoll*, 72 Iowa 583, 34 N. W. 428.

³⁴ *Driscoll v. People*, 47 Mich. 416, 11 N. W. 221; *People v. Hicks*, 98

Mich. 86, 56 N. W. 1102; *State v. Smith*, 26 Wash. 354, 67 Pac. 70; see also, *Lambert v. People*, 29 Mich. 71; *People v. Morrigan*, 29 Mich. 4.

³⁵ Such seems to be the English rule, *Rex v. Wink*, 6 Car. & P. 397; *Reg. v. Gandfield*, 2 Cox Cr. Cas. 43.

³⁶ *McCarty v. State*, 127 Ind. 223, 26 N. E. 665; *State v. Helvin*, 65 Iowa 289, 21 N. W. 645.

³⁷ *Commonwealth v. White*, 133 Pa. St. 182, 19 Atl. 350, 19 Am. St. 628; *State v. Perley*, 86 Me. 427, 30

Where the indictment alleges that several articles have been taken by robbery, proof of the robbery of one is sufficient.³⁸ The value may also be important upon the question of intent where the value is insignificant and the defense is that it was taken by way of a joke.³⁹

§ 3136. Recent possession of stolen property.—Where it has been shown that a robbery has been committed, evidence of the possession of the fruits of the crime shortly after its commission certainly has some tendency, in the absence of explanation, to show guilt of the possessor. Evidence of the recent possession of stolen goods would, therefore, seem to be admissible at least where the circumstances are such as to show that robbery was committed, and there are authorities so holding.⁴⁰ Indeed, in one case it is said: “The rule of law being that where the accused has in possession other stolen property, or property acquired by robbery, this is a circumstance corroborative of the inference of guilty possession of the particular property which he is charged with stealing, or otherwise feloniously acquiring.”⁴¹ And it was competent also to introduce evidence of a subsequent robbery, so recently and subsequently committed, and in circumstances so very similar to the one under review as to show that that one was part of a system or series of criminal operations; and this for the purpose, also, of proving the guilty and common intent which prompted the doing of the act done, and as showing defendant’s manner and method of performing such acts.”⁴² And in an elaborate note upon the general subject in the set of reports edited by Mr. Freeman, it is said: “Although the cases in which the doctrine relating to the possession of stolen goods with reference to the crime of robbery are not very numerous, still the practice of receiving such testimony is quite general. From the very nature of the crime of robbery, such possession

Atl. 74, 41 Am. St. 564; *McCarty v. State*, 127 Ind. 223, 26 N. E. 665; *James v. State*, 53 Ala. 380; *State v. Perley*, 86 Me. 427, 30 Atl. 74, 41 Am. St. 564.

³⁸ *Brown v. State*, 120 Ala. 342, 25 So. 182.

³⁹ *Commonwealth v. White*, 133 Pa. St. 182, 19 Atl. 350, 19 Am. St. 623.

⁴⁰ *State v. Wyatt*, 124 Mo. 537, 27 S. W. 1096; *State v. Balch*, 136 Mo. 103, 37 S. W. 808; see also, *Bradley v. State*, 103 Ala. 29, 15 So. 640; *State v. Harris*, 97 Iowa 407, 66 N. W. 728; *State v. Sullivan*, 9 Mont. 174, 24 Pac. 23; *People v. Mackinder*, 80 Hun (N. Y.) 40, 29 N. Y. S. 842.

⁴¹ Citing, *State v. Castor*, 93 Mo. 242, 5 S. W. 906; *State v. Moore*, 101 Mo. 316, 14 S. W. 182; 3 Greenleaf Ev. (14th ed.), § 31; Will. Circ. Ev., chap. 3, § 4.

⁴² *State v. Balch*, 136 Mo. 103, 37 S. W. 808.

ought not to be of controlling weight unless the essential elements of the crime of robbery are proved and there are other circumstances connecting the possessor of the stolen goods with the crime. It seems that the same principles which a court would apply to evidence of such possession in a burglary case ought to apply in a robbery case."⁴³ We think there is no presumption of law, however, from the mere fact of such possession, that the possessor is guilty of robbery.

§ 3137. Evidence of other offenses.—If, while the accused was engaged in the commission of the alleged robbery, he also committed another offense, the whole transaction, is usually admissible as part of the *res gestae* notwithstanding the fact that the evidence also shows the commission of such other offense.⁴⁴ This is especially true in case of a conspiracy.⁴⁵ So, such evidence is often admissible to show intent,⁴⁶ or to identify the accused.⁴⁷ But evidence has been held incompetent to show that the accused at another time and place robbed another person,⁴⁸ where there was no connection between the two crimes.

§ 3138. Circumstantial evidence.—Circumstantial as well as direct evidence is admissible in case of robbery, and, while the defendant's guilt must be proved beyond a reasonable doubt, such proof may be made, in a proper case, by circumstantial evidence. Thus, as already shown, evidence of the taking of other property under similar circumstances may be given, in a proper case, as tending to prove guilt of accused in a particular case.⁴⁹ Burglar's tools, dynamite and other articles used for robbery, when found upon the person of the accused, are competent as evidence upon a trial for robbery,⁵⁰ but such articles

⁴³ 101 Am. St. 484, note.

⁴⁴ *State v. Howard*, (Mont.) 77 Pac. 50; *People v. Nelson*, 85 Cal. 421, 24 Pac. 1006; *Davis v. State*, (Tex. Cr. App.) 23 S. W. 684; see also, *People v. Pallister*, 138 N. Y. 601, 33 N. E. 741; *Snapp v. Commonwealth*, 82 Ky. 173; *State v. McCahill*, 72 Iowa 111, 30 N. W. 553, 33 N. W. 599; *Kennedy v. State*, 107 Ind. 144, 6 N. E. 305.

⁴⁵ *State v. Howard*, (Mont.) 77 Pac. 50.

⁴⁶ See also, 62 L. R. A. 193, note.

⁴⁷ *Hope v. People*, 83 N. Y. 418, 38 Am. R. 460; *State v. Balch*, 136 Mo. 109, 37 S. W. 808; *Davis v. State*, (Tex. Cr. App.) 44 S. W. 1099; *Reg. v. Briggs*, 2 Moody & R. 199.

⁴⁸ *State v. Spray*, 174 Mo. 569, 74 S. W. 846; *People v. Romano*, 84 App. Div. (N. Y.) 318, 82 N. Y. S. 749; see also, *Coble v. State*, 31 Ohio St. 100.

⁴⁹ *State v. Balch*, 136 Mo. 103, 37 S. W. 808. See also, ante, § 3137, evidence of other offenses.

⁵⁰ *State v. Minot*, 79 Minn. 118, 81

when not connected with the accused can not be used.⁵¹ Suspicious actions upon the part of the defendant immediately after the act, as burying money in the yard, may also be shown in a prosecution for robbery.⁵²

§ 3139. Circumstantial evidence — Corroboration. — Where there was evidence that in a scuffle in which the defendant had robbed the prosecuting witness, that the money was torn in two, the torn pieces remaining in the prosecutor's hands were held admissible in corroboration of the assault.⁵³ Evidence of the burglary of a bank, immediately after the defendant forcibly took the key from the janitor of the bank, is admissible as connecting the defendant with the robbery of the key.⁵⁴ Evidence of other acts of robbery upon the part of the accused may also be admissible in a proper case as tending to establish guilt in the present case.⁵⁵ Testimony that the prosecuting witness had money of the value and description charged to have been taken, in his possession, shortly before the alleged robbery has also been held admissible⁵⁶ as corroborating evidence. So, where, in anticipation of being robbed, and in order to detect the robber, the prosecuting witness carried marked currency, the admission in evidence of a written memorandum preserved by another witness, at the time he gave the prosecuting witness the bills, of the numbers and denominations thereof, and used by the witness, who stated that it was correct and made at the time, was held not to be erroneous.⁵⁷ It has been held that a physician who attended the person immediately after the robbery may testify as to her condition at that time.⁵⁸ Evidence of the wounded condition of an accomplice, and that he had pistols in his possession after the robbery, which were covered with blood has been held admissible; and where defendant is tried with others, evidence of finding part of the

N. W. 753; *State v. Shields*, 13 S. Dak. 464, 83 N. W. 559; *Denman v. State*, (Tex. Cr. App.) 47 S. W. 366; *Turley v. People*, 188 Ill. 628, 59 N. E. 506.

⁵¹ *Williams v. State*, 51 Neb. 711, 71 N. W. 729; *People v. Oldham*, 111 Cal. 648, 44 Pac. 312; *People v. Sansome*, 84 Cal. 449, 24 Pac. 143.

⁵² *Thompson v. State*, 35 Tex. Cr. App. 511, 34 S. W. 629.

⁵³ *Tracy v. State*, 46 Neb. 361, 64 N. W. 1069.

⁵⁴ *Hope v. People*, 83 N. Y. 418, 38 Am. R. 460.

⁵⁵ *State v. Fallon*, 2 N. Dak. 510, 52 N. W. 318; *Armstrong v. State*, 34 Tex. Cr. App. 248, 30 S. W. 235.

⁵⁶ *Bradley v. State*, 103 Ala. 29, 15 So. 640.

⁵⁷ *Jones v. State*, (Tex. Cr. App.) 88 S. W. 217.

⁵⁸ *Commonwealth v. Flynn*, 165 Mass. 153, 42 N. E. 562.

stolen goods upon one of the others has been held competent.⁵⁹ Burglar's tools may be used against the defendant as evidence in a proper case,⁶⁰ and when the stolen property is found in the defendant's house, this may be shown in evidence, especially when he is identified as the man who committed the act.⁶¹ In a recent case where the prosecuting witness had testified that he pointed out to a certain person in company with others, the place where the robbery was committed, it was held that evidence of such person that he, in company with such others, went to the place of the crime and made certain measurements from the point so shown by prosecutor, was admissible.⁶² It was also held in the same case that evidence that the defendant was booked at the police station by an assumed name was not admissible, but that where three persons were charged with robbery, evidence of the keeper of a boarding-house, at which they stopped prior to the commission of the offense, that two of them, including the defendant, registered under assumed names was admissible.

§ 3140. Defenses.—It has been held that the defendant may testify that at the time of the taking of the property, he thought it was his own and that he had a right to take it, as there could be no robbery where the owner took what rightfully belonged to him.⁶³ It has also been held that while voluntary drunkenness is no excuse for crime, yet evidence of intoxication and the mental condition of the defendant is entitled to go to the jury upon the question of felonious intent, and if the intoxication was so great that he did not know what he was doing and could not entertain or form a felonious intent it would constitute a good defense.⁶⁴ The defendant may also rely upon an alibi and introduce proper evidence to prove it, or he may, in general, introduce any

⁵⁹ *People v. Whitson*, 43 Mich. 419, 5 N. W. 454; *People v. Mackinder*, 80 Hun (N. Y.) 842, 29 N. Y. S. 842; also see, *Crumes v. State*, 28 Tex. App. 516, 13 S. W. 868, 19 Am. St. 853; *Bow v. People*, 160 Ill. 438, 43 N. E. 593.

⁶⁰ *State v. Shannon*, 33 Mo. 596. Concerning pistol, see, *Williams v. State*, 34 Tex. Cr. App. 523, 31 S. W. 405.

⁶¹ *State v. Wayatt*, 124 Mo. 537, 27 S. W. 1096.

⁶² *People v. Kelly*, (Cal.) 79 Pac. 846.

⁶³ *Boles v. State*, 58 Ark. 35, 22 S. W. 887; *State v. Dengel*, 24 Wash. 49, 63 Pac. 1104; see, *People v. Becker*, 48 Mich. 43, 11 N. W. 779; see also, *Commonwealth v. White*, 133 Pa. St. 182, 19 Atl. 350, 19 Am. St. 628.

⁶⁴ *Keeton v. Commonwealth*, 92 Ky. 522, 18 S. W. 359; see also, *Roberts v. People*, 19 Mich. 401; *People v. Walker*, 38 Mich. 156; *People v. Harris*, 29 Cal. 678; *Wood v. State*, 34 Ark. 341, 36 L. R. A. 469, note.

proper evidence to rebut that of the prosecution and to show that no such crime as that charged was committed or that he was not the guilty party, and if he does so successfully it will constitute a good defense.⁶⁶ There is nothing so peculiar about the defenses in robbery cases as to require any further treatment in this connection. Attention is called, however, to a recent case in which police officers were held guilty of robbery in forcibly searching a prisoner and keeping part of the valuables found upon him with felonious intent, notwithstanding they set up in defense the legality of the arrest the right to use force and to search the prisoner. The court said, in substance, that although the officers make a rightful arrest, yet if they subsequently use violence and rob the party arrested, they are not exonerated on account of the legality of the alleged arrest, and that conceding that they may search the prisoner and take valuables from him for the purpose of keeping them safely until he is set free, yet, if they had the intent, at the time of finding valuables or money on him, to take the same, and used force to make the search, and did take the valuables for themselves, their right of search is not available to defeat a prosecution for robbery.⁶⁷

⁶⁶ In *State v. Fair*, 35 Wash. 127, 76 Pac. 731, the jury found that the defendant was guilty notwithstanding several witnesses testified that he was many miles away at the time of the robbery, but, the evidence being conflicting, the verdict was upheld. But in *State v. Campbell*, 69 Iowa 556, 29 N. W. 604, the judgment of conviction was reversed because an alibi was clearly

shown and the evidence failed to connect the accused with the crimes.

⁶⁷ *Jones v. State*, (Tex. Cr. App.) 88 S. W. 217. See also, *Rex v. Gascoigne*, 1 Leach C. C. 313. And subsequent return of the property is no defense where the crime is already complete. *McGinty v. State*, 97 Ga. 368, 23 S. E. 831; *Hope v. People*, 83 N. Y. 418, 38 Am. R. 460; *Rex v. Peat*, 1 Leach C. C. 266.

CHAPTER CLIII.

SEDUCTION.

Sec.

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§ 3141. **Definition—Elements.**—Seduction, as such, was not an indictable crime at common law.¹ It is now made such, however, by statute in nearly all, if not all, jurisdictions. Seduction is defined by the statutes of most states as the act of persuading or inducing a woman of previous chaste character (or of good repute for chastity, according to some of them), to depart from the path of virtue and obtaining her consent to illicit intercourse, by means of promises and persuasions.² It is generally necessary to show that the intercourse was accomplished by some artifice or deception, and the law will not

¹ *Wilson v. State*, 73 Ala. 527; *People v. Nelson*, 153 N. Y. 90, 46 N. E. 1040, 60 Am. St. 592; *Anderson v. Commonwealth*, 5 Rand. (Va.) 627, 16 Am. Dec. 776; 87 Am. Dec. 405, note.

² See, *People v. De Fore*, 64 Mich. 693, 31 N. W. 585, 8 Am. St. 863; *Patterson v. Hayden*, 17 Ore. 238, 21 Pac. 129, 11 Am. St. 822; *Phillips v. State*, 108 Ind. 406, 9 N. E. 345; *Callahan v. State*, 63 Ind. 198; *Norton v. State*, 72 Miss. 128, 16 So. 264, 87 Am. Dec. 405, 406, note. This does not mean, however, that there cannot be seduction where a woman, although once fallen, has reformed

and is chaste at the time of the alleged seduction. Perhaps no better general definition of seduction as a crime can be given than that suggested in the note in 76 Am. St. 659, 682, although even that definition does not include every element essential under some statutes. It is as follows: "The act of a man in seducing a woman of previous chaste character or good repute to have unlawful sexual intercourse with him, either by means of promises, persuasions, or arts of deception, or by means of a promise of marriage, or by means of a promise of marriage and some other persuasion."

inflict the penalty visited upon seduction as a crime where it is shown that only an appeal to the woman's passion was indulged in by the man.³ In many, but not all, of the states there must also be a promise of marriage.⁴ Essential elements, under all the statutes, however, are the illicit intercourse,⁵ and the consent of the woman,⁶ which, if not obtained by a false or feigned promise of marriage, must generally be obtained at least by some kind of arts, wiles, enticement or persuasion. It is also essential in many of the states that the woman should be unmarried.⁷

§ 3142. Burden of proof.—The burden is upon the state to prove the defendant's guilt beyond a reasonable doubt, and, of course, the essential elements of the crime must be proved.⁸ We have already

³ *State v. Hemm*, 82 Iowa 609, 48 N. W. 971; *People v. Clark*, 33 Mich. 112; *State v. Fitzgerald*, 63 Iowa 268, 19 N. W. 202; *State v. Patterson*, 88 Mo. 88, 57 Am. R. 374; see, however, *Powell v. State*, (Miss.) 20 So. 4.

⁴ *Mills v. Commonwealth*, 93 Va. 815, 22 S. E. 863; *Barker v. Commonwealth*, 90 Va. 820, 20 S. E. 776; *Callahan v. State*, 63 Ind. 198; 87 Am. Dec. 408, note; see also, *People v. Clark*, 33 Mich. 112; *Bowers v. State*, 29 Ohio St. 542; *Cole v. State*, 40 Tex. 147; *People v. Kehoe*, 123 Cal. 224, 55 Pac. 911, 69 Am. St. 52; *West v. State*, 1 Wis. 209; *Wright v. State*, 62 Ark. 145, 34 S. W. 545, 76 Am. St. 670, note.

⁵ *Cunningham v. State*, 73 Ala. 51; *Cheaney v. State*, 36 Ark. 74; *People v. Hubbard*, 92 Mich. 322, 52 N. W. 729; *State v. Reeves*, 97 Mo. 668, 10 S. W. 841, 10 Am. St. 349; *Safford v. People*, 1 Park. Cr. Cas. (N. Y.) 474; *State v. Horton*, 100 N. Car. 443, 6 S. E. 238, 6 Am. St. 613; *State v. King*, 9 S. Dak. 628, 70 N. W. 1046; *Bailey v. State*, 36 Tex. Cr. App. 540, 38 S. W. 185; *Gorzell v. State*, 43 Tex. Cr. App. 82, 63 S. W. 126.

⁶ *Jones v. State*, 90 Ga. 616, 16 S. E. 380; *People v. Gibbs*, 70 Mich. 425, 38 N. W. 257; *People v. Nelson*, 153 N. Y. 90, 46 N. E. 1040, 60 Am. St. 592; *State v. Horton*, 100 N. Car. 443, 6 S. E. 238, 6 Am. St. 613; *Barnes v. State*, 37 Tex. Cr. App. 320, 39 S. W. 684; *Croghan v. State*, 22 Wis. 444. In most of these cases seduction is distinguished from rape mainly on this ground. See also, *State v. Lewis*, 48 Iowa 578, 30 Am. R. 407; *Hodges v. Bales*, 102 Ind. 494; *People v. Royal*, 53 Cal. 62; *People v. De Fore*, 64 Mich. 693, 31 N. W. 585, 8 Am. St. 863; and compare, *State v. Kingsley*, 39 Iowa 439.

⁷ See note in 76 Am. St. 676, and authorities referred to there and in subsequent sections in this chapter. Essential elements under the statutes of several different jurisdictions are referred to in *La Rosae v. State*, 132 Ind. 219, 221, 37 N. E. 789.

⁸ See, *People v. Krusick*, 93 Cal. 74, 28 Pac. 794; *State v. Marshall*, 137 Mo. 463, 36 S. W. 619; *Snodgrass v. State*, (Tex. Cr. App.) 31 S. W. 366; see also, *Smith v. State*, 107 Ala. 139, 18 So. 306; *Suther v. State*, 118 Ala. 88, 24 So. 43; *State v. Fisher*, 162 Mo. 169, 62 S. W. 690;

called attention to those that are prescribed by most of the statutes, but the local statutes and decisions must be consulted upon the subject. The statutes of most states make it a crime to seduce a female of good repute for chastity or of previous chaste character, under promise of marriage, or the like; therefore it is held to be the duty of the state in these cases, to prove her good repute or previous chaste character, as the case may be, affirmatively.⁹ The burden is upon the state to prove the age of the female, her previous chaste character, the promise of marriage and the seduction because of the promise, and where the state has done this, a *prima facie* case is established.¹⁰ The burden is also upon the state, in many jurisdictions at least, to show that the prosecutrix was an unmarried woman at the time of the alleged seduction.¹¹ In some states the female must be under the age of twenty-one years.¹²

§ 3143. Presumptions.—It is frequently said that in a prosecution for seduction the chastity of the one seduced at the time of the

State v. Brown, 64 N. J. L. 414, 45 Atl. 800. But in some jurisdictions the presumption of chastity has been carried so far that the defendant must prove by a preponderance of the evidence that the character of the prosecutrix for chastity was bad, in order to escape conviction on that ground, and that a reasonable doubt by the jury on that subject is insufficient to acquit. See, *State v. Hemm*, 82 Iowa 609, 48 N. W. 971; *State v. Brown*, 86 Iowa 121, 53 N. W. 92.

⁹ *Oliver v. Commonwealth*, 101 Pa. St. 215, 47 Am. R. 704; *Zabriskie v. State*, 43 N. J. L. 640, 39 Am. R. 610; *State v. McCaskey*, 104 Mo. 644, 16 S. W. 511; *West v. State*, 1 Wis. 209; *People v. Wallace*, 109 Cal. 611, 42 Pac. 159; *Norton v. State*, 72 Miss. 128, 16 So. 264, 18 So. 916, 48 Am. St. 538; *State v. Eckler*, 106 Mo. 585, 17 S. W. 814, 27 Am. St. 372; see also, *Harvey v. Territory*, 11 Okla. 156, 65 Pac. 837; *State v. Horton*, 100 N. Car. 443, 6 S. E. 238, 6 Am. St. 613; contra,

State v. McClintic, 73 Iowa 663, 35 N. W. 696; also see, *State v. Thornton*, 108 Mo. 640, 18 S. W. 841; *Barker v. Commonwealth*, 90 Va. 820, 20 S. E. 776; *Mills v. Commonwealth*, 93 Va. 815, 22 S. E. 863; *Caldwell v. State*, (Ark.) 83 S. W. 929. This may depend somewhat upon the language of the particular statute.

¹⁰ *State v. Lockerby*, 50 Minn. 363, 52 N. W. 958, 36 Am. St. 656; *State v. Thornton*, 108 Mo. 640, 18 S. W. 841; *People v. Wallace*, 109 Cal. 611, 42 Pac. 159; *Oliver v. Commonwealth*, 101 Pa. St. 215, 47 Am. R. 704.

¹¹ *People v. Krusick*, 93 Cal. 74, 28 Pac. 794; *West v. State*, 1 Wis. 209; *State v. Wheeler*, 108 Mo. 658, 18 S. W. 924.

¹² *Burns Ind. Rev. Stat.*, § 2070; *New York Penal Code*, 284; *Connecticut Gen. Stat.* 1526; *Iowa Code*, 3867; *Michigan Hore. Sts.* 9283; *Missouri Rev. Stat.* 3486; *Ohio Rev. Stat.* 7022; *Rhode Island Pub. Stat.* 244.

seduction will be presumed, in the absence of evidence to the contrary,¹³ and, in a sense this is true. This presumption, however, may be rebutted by circumstances surrounding the case or by proven or admitted facts.¹⁴ Though the law presumes the prosecutrix chaste, still the burden is upon the state, under many of the statutes at least, to allege and prove her previous chaste character or good repute, for every one is presumed innocent until proved guilty.¹⁵ This is believed to be the better rule, at least as to good repute, although as shown in the first note to the last preceding section, there is some conflict among the authorities. A presumption of reformation may arise where a reasonable time has elapsed after the first seduction or intercourse, but where the act is committed frequently, no such presumption can well arise, and the burden is upon the state.¹⁶

§ 3144. Question of law or fact.—Every case of seduction, it is said, must be determined by the jury upon the peculiar circumstances surrounding the case, for what would be sufficient to overpower the mind of one woman would have but little influence upon the mind of another; therefore, the age, advantages in life, the intelligence of the parties and their condition are circumstances to be considered and weighed in the balance in determining whether there has been seduction.¹⁷ It has been held that a witness will not be allowed to testify that the defendant acted as a lover of the girl, as this question is for

¹³ *Andre v. State*, 5 Iowa 389, 68 Am. Dec. 708; *People v. Brewer*, 27 Mich. 134; *People v. Squires*, 49 Mich. 487, 13 N. W. 828; *McTyler v. State*, 91 Ga. 254, 18 S. E. 140; *O'Neill v. State*, 85 Ga. 383, 11 S. E. 856; *Mills v. Commonwealth*, 93 Va. 815, 22 S. E. 863; *Ferguson v. State*, 71 Miss. 805, 15 So. 66; *State v. McClintic*, 73 Iowa 663, 35 N. W. 696, holds that the previous chaste character of the prosecutrix is presumed and the state is not required to prove it; see and compare, *State v. Wenz*, 41 Minn. 196, 42 N. W. 933; *Norton v. State*, 72 Miss. 128, 18 So. 916, 48 Am. St. 538.

¹⁴ *State v. Bowman*, 45 Iowa 418; *Polk v. State*, 40 Ark. 482, 48 Am. R. 17; *McTyler v. State*, 91 Ga. 254,

18 S. E. 140; *Mills v. Commonwealth*, 93 Va. 815, 22 S. E. 863.

¹⁵ *State v. McCaskey*, 104 Mo. 644, 16 S. W. 511; *West v. State*, 1 Wis. 209; *State v. Wenz*, 41 Minn. 190, 42 N. W. 933; *State v. Eckler*, 106 Mo. 858, 17 S. W. 814, 27 Am. St. 372; see also note to, *People v. De Fore*, 8 Am. St. 871; note to, *State v. Carron*, 87 Am. Dec. 407; *Bishop Stat. Crimes* (2nd ed.) 648; *Suther v. State*, 118 Ala. 88, 24 So. 43.

¹⁶ *People v. Clark*, 33 Mich. 112; *People v. Squires*, 49 Mich. 487, 13 N. W. 828.

¹⁷ *State v. Fitzgerald*, 63 Iowa 268, 19 N. E. 202; *State v. Higdon*, 32 Iowa 262; *State v. Heatherton*, 60 Iowa 175, 14 N. W. 230.

the jury, and the witness must confine himself to a description of the acts and will not be allowed to draw inferences.¹⁸ The competency of corroborative evidence is a question for the court, but the weight or sufficiency of the evidence is for the jury.¹⁹ And the question of the chastity of the prosecutrix is a question for the jury.²⁰

§ 3145. Chastity.—The statutes of many of the states provide that the woman seduced shall have been of a previous chaste character.²¹ The question of the virtue of the prosecutrix is an important question to be considered in determining whether the defendant is guilty of seduction.²² The previous chaste character referred to in the statutes of most states is held to have reference to the time immediately preceding the act, and under no circumstances will evidence be allowed which has reference to the woman's character after the offense.²³ There is some conflict in the several states as to just how long before the act the defendant may show improper relations with other men, but evidence upon the subject of previous chaste character must not extend to a time that is too remote. The chastity of the female under such statutes may be impeached by evidence of

¹⁸ *Carney v. State*, 79 Ala. 14; *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177.

¹⁹ *State v. Bell*, 49 Iowa 440; *State v. Kingsley*, 39 Iowa 439; *State v. Brinkhaus*, 34 Minn. 285, 25 N. W. 642; *State v. Curran*, 51 Iowa 112, 49 N. W. 1006; *State v. Smith*, (Iowa) 100 N. W. 40; *Jones v. State*, 90 Ga. 616, 16 S. E. 380; see, however, *Mills v. Commonwealth*, 93 Va. 815, 22 S. E. 863; *Cunningham v. State*, 73 Ala. 51.

²⁰ *McTyler v. State*, 91 Ga. 254, 18 S. E. 140; *State v. Hemm*, 82 Iowa 609, 48 N. W. 971.

²¹ *Wood v. State*, 48 Ga. 192, 15 Am. R. 664; *Polk v. State*, 40 Ark. 482, 48 Am. R. 17; *People v. Nelson*, 153 N. Y. 90, 46 N. E. 1040, 60 Am. St. 592; note to, *State v. Carron*, 87 Am. Dec. 408; *Polk v. State*, 40 Ark. 482, 48 Am. R. 17, holds in substance that even where the statute did not

provide that the woman seduced should have been of previous chaste character, still this is a matter of investigation; see also, *Putman v. State*, 29 Tex. App. 454, 16 S. W. 97; *Norton v. State*, 72 Miss. 128, 18 So. 916, 48 Am. St. 538.

²² *Andre v. State*, 5 Iowa 389, 68 Am. Dec. 408; *Polk v. State*, 40 Ark. Ga. 474, 20 S. E. 211; *State v. Deitrick*, 51 Iowa 467, 1 N. W. 732.

²³ *Bracken v. State*, 111 Ala. 68, 20 So. 636, 56 Am. St. 23; *People v. Brewer*, 27 Mich. 134; *State v. Brassfield*, 81 Mo. 151, 51 Am. R. 234; *Boyce v. People*, 55 N. Y. 644; *State v. Clemons*, 78 Iowa 123, 42 N. W. 562; *People v. Clark*, 33 Mich. 112; *State v. Dunn*, 53 Iowa 526, 5 N. W. 707; *Mann v. State*, 34 Ga. 1; *State v. Wells*, 48 Iowa 671; see. *Brock v. State*, 95 Ga. 474, 20 S. E. 211; *Smith v. Commonwealth*, (Ky.) 32 S. W. 137.

specific acts of immorality,²⁴ and it has been held that the prosecuting witness may be cross-examined as to whether she had not used indecent language with other men or been found in bed with other men.²⁵ Under such statutes, unlike those to be considered in the next section, character is directly in issue, and it is generally held, in accordance with the distinction elsewhere stated,²⁶ that it may be impeached by specific acts of lewdness, and evidence of mere reputation is inadmissible for that purpose.²⁷ But where the chastity of the prosecutrix has been impeached by evidence of specific acts this, it seems, may be rebutted not only by direct evidence to the contrary, but also by evidence of good reputation, and testimony that the prosecuting witness was a woman of good character and good repute for some time prior to the alleged seduction, has been held admissible as tending to establish previous chaste character.²⁸ Witnesses who knew the prosecuting witness well and were neighbors may testify that they never heard anything against her character for chastity, and that her reputation therefor was good.²⁹ It has also been held that the prosecutrix herself may testify to her previous virtue.³⁰ So, on the other hand, her own declarations and admissions have been held competent to show her prior unchastity when they relate to her prior acts, although made after the alleged seduction.³¹ It has also been held that the defendant may show that no pain was inflicted on the prosecutrix,

²⁴ *Polk v. State*, 40 Ark. 482, 48 Am. R. 17; *People v. Clark*, 33 Mich. 112; see, *State v. Payson*, 71 Iowa 542, 32 N. W. 484; but compare, *State v. Bryan*, 34 Kans. 63, 8 Pac. 260; *State v. Brassfield*, 81 Mo. 151, *State v. Bryan*, 34 Kans. 63, 8 Pac. 51 Am. R. 234; (overruled, *State v. Patterson*, 88 Mo. 88, 57 Am. R. 374;) *Safford v. People*, 1 Park. Cr. Cas. (N. Y.) 474.

²⁵ *State v. Sutherland*, 30 Iowa 570; but see, *Polk v. State*, 40 Ark. 482, 48 Am. R. 17.

²⁶ See Vol. I, §§ 171, 176.

²⁷ *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177; *State v. Patterson*, 88 Mo. 88, 57 Am. R. 374; *State v. Prizer*, 49 Iowa 531, 31 Am. R. 155; *State v. Reinheimer*, 109 Iowa 624, 80 N. W. 669; and authorities

in next to last note supra; *State v. Shean*, 32 Iowa 88.

²⁸ *People v. Samonset*, 97 Cal. 448, 32 Pac. 520; *Smith v. State*, 107 Ala. 139, 18 So. 306; *State v. Deltrick*, 51 Iowa 467, 1 N. W. 732; *State v. Dunn*, 53 Iowa 526, 5 N. W. 707, holds that conduct eight years prior to the alleged seduction is inadmissible to prove her unchaste; *State v. Hemm*, 82 Iowa 609, 48 N. W. 971.

²⁹ *State v. Bryan*, 34 Kans. 63, 8 Pac. 260; *State v. Deltrick*, 51 Iowa 467, 1 N. W. 732; *State v. Brandenburg*, 118 Mo. 181, 23 S. W. 1080, 40 Am. St. 362.

³⁰ *Kenyon v. People*, 26 N. Y. 203, 208.

³¹ *State v. Clemons*, 78 Iowa 123, 42 N. W. 562.

that there was no laceration and blood, as these are the natural and ordinary, although not the invariable, results of the first act of copulation with a virgin, and their absence tends to show that she was not a chaste virgin, and hence not the subject of seduction under the statutes.⁸²

§ 3146. Reputation.—As shown in the last preceding section, where the prosecutrix must be of previous chaste character, as distinguished from reputation, evidence of the general reputation of the prosecuting witness for chastity is not admissible. Character for chastity means actual personal virtue and not mere reputation.⁸³ The term “character” means that which the woman really is rather than what she may be reputed to be.⁸⁴ Proof of actual sexual intercourse is not always necessary, however, to establish unchastity sufficient to prevent a conviction, but there is some difference of opinion as to just what is sufficient to constitute chastity or unchastity within the meaning of the statutes.⁸⁵ In those states where the words “chaste repute” or “good repute” are used instead of “chaste character” no presumption in favor of the woman exists, but the state must affirmatively prove her reputation.⁸⁶ The prosecutrix’s reputation for chastity is what the people who know her well generally say of her credit and standing for chastity. In such a case it is held competent to show by her neighbors and those acquainted with her that they have

⁸² *Barnes v. State*, 37 Tex. Cr. App. 320, 39 S. W. 684.

⁸³ *State v. Prizer*, 49 Iowa 531, 31 Am. R. 155; *People v. Clark*, 33 Mich. 112; *Hussey v. State*, 86 Ala. 34, 5 So. 484; *State v. Wheeler*, 94 Mo. 252, 7 S. W. 103, holds that “repute” in an indictment for seduction, is not limited to the female’s reputation for chastity or to the esteem in which she is held generally for chastity in the neighborhood where she resides or with whom she is associated.

⁸⁴ *State v. Brassfield*, 81 Mo. 151, 51 Am. R. 234; *People v. Brewer*, 27 Mich. 134; *Andre v. State*, 5 Iowa 389, 68 Am. Dec. 708; *Boak v. State*, 5 Iowa 430; *State v. Prizer*, 49 Iowa 531, 31 Am. R. 155.

⁸⁵ See, *Andre v. State*, 5 Iowa 389, 68 Am. Dec. 708; *Wood v. State*, 48 Ga. 192, 15 Am. R. 664; *Powell v. State*, (Miss.) 20 So. 4; *People v. Kehoe*, 123 Cal. 224, 55 Pac. 911, 69 Am. St. 52; *State v. Brinkhaus*, 34 Minn. 285, 25 N. W. 642; *Creighton v. State*, 41 Tex. Cr. App. 101, 51 S. W. 910; *O’Neill v. State*, 85 Ga. 383, 11 S. E. 856, 76 Am. St. 679, note.

⁸⁶ *Oliver v. Commonwealth*, 101 Pa. St. 215, 47 Am. R. 704; *Zabriskie v. State*, 43 N. J. L. 640, 39 Am. R. 610; *State v. Bryan*, 34 Kans. 63, 8 Pac. 260; *State v. Wheeler*, 94 Mo. 252, 7 S. W. 103; *State v. McCaskey*, 104 Mo. 644, 16 S. W. 511; *State v. Sharp*, 132 Mo. 165, 33 S. W. 795.

never heard her conduct questioned, criticized or talked about, as the best character is the one least talked about.³⁷ And evidence of the woman's reputation, instead of specific acts of lewdness, is admissible under such statutes.³⁸

§ 3147. Reformation.—The prosecutrix may show a reformation upon her part even though she was at one time unchaste.³⁹ She may show that at the time of the alleged seduction she was a virtuous woman,⁴⁰ living as such, but where only a short time has intervened since the prosecutrix was unchaste, clear and convincing evidence is said to be necessary.⁴¹ The burden in such a case is held to be upon the prosecution to show the reformation.⁴²

§ 3148. Promise of marriage.—There can ordinarily be no seduction unless some promise or artifice is proved,⁴³ and this promise

³⁷ *State v. Bryan*, 34 Kans. 63, 8 Pac. 260; *State v. Patterson*, 88 Mo. 88, 57 Am. R. 374.

³⁸ *Bowers v. State*, 29 Ohio St. 542; *Williams v. State*, 3 Ind. App. 350, 354, 29 N. E. 1079; *State v. Brassfield*, 81 Mo. 151, 51 Am. R. 234; *State v. Sharp*, 132 Mo. 165, 33 S. W. 795; *State v. Atterberry*, 59 Kans. 237, 52 Pac. 451; see also, Vol. I, § 171; *People v. Brewer*, 27 Mich. 134; *Boyce v. People*, 55 N. Y. 644.

³⁹ *State v. Carron*, 18 Iowa 372, 87 Am. Dec. 401; and note, *State v. Moore*, 78 Iowa 494, 43 N. W. 273; *State v. Knutson*, 91 Iowa 549, 60 N. W. 129; *People v. Clark*, 33 Mich. 112; see also, *Wilson v. State*, 73 Ala. 527, 533; *Patterson v. Hayden*, 17 Ore. 238, 21 Pac. 129, 11 Am. St. 822; *Bowers v. State*, 29 Ohio St. 542, 545; *Williams v. State*, 3 Ind. App. 350, 29 N. E. 1079; *Bishop Stat. Crimes*, § 639; *State v. Sharp*, 132 Mo. 165, 33 S. W. 795; *Kelly v. State*, 33 Tex. Cr. App. 31, 24 S. W. 295.

⁴⁰ *Kenyon v. People*, 26 N. Y. 203,

84 Am. Dec. 177; *State v. Moore*, 78 Iowa 494, 43 N. W. 273; *State v. Carron*, 18 Iowa 372, 87 Am. Dec. 401; *Wood v. State*, 48 Ga. 192, 15 Am. R. 664; *State v. Brassfield*, 81 Mo. 151, 51 Am. R. 234; *State v. Timmens*, 4 Minn. 325.

⁴¹ *People v. Squires*, 49 Mich. 487, 13 N. W. 828; *People v. Clark*, 33 Mich. 112; *People v. Millspaugh*, 11 Mich. 278, holds that a man may be prosecuted for seduction at any time within one year of such last intercourse.

⁴² *People v. Squires*, 49 Mich. 487, 13 N. W. 828; *People v. Clark*, 33 Mich. 112.

⁴³ *State v. Hemm*, 82 Iowa 609, 48 N. W. 971; *State v. Fitzgerald*, 63 Iowa 268, 19 N. W. 202; *State v. Horton*, 100 N. Car. 443, 6 S. E. 238, 6 Am. St. 613; *State v. Crawford*, 34 Iowa 40; *People v. Clark*, 33 Mich. 112; *O'Neill v. State*, 85 Ga. 383, 11 S. E. 856; *Jones v. State*, 90 Ga. 616, 16 S. E. 380; *McTyler v. State*, 91 Ga. 254, 18 S. E. 140; *State v. Heatherton*, 60 Iowa 175, 14 N. W. 230.

may be shown by the conversation and what was said,⁴⁴ the circumstances surrounding the act and other acts or incidents which would tend to show a promise.⁴⁵ The consent of the female to marry her seducer may be implied from the circumstances.⁴⁶ Evidence of the declarations of the defendant, about the time of the alleged seduction that he intended to marry the prosecuting witness, is also admissible as tending to show a promise,⁴⁷ and corroborate the prosecutrix upon that point. It is not necessary that the promise be technically valid if it was relied upon by the woman.⁴⁸ But where the woman does not rely upon the promise, as where she knows the defendant to be a married man at the time of the seduction, then in that case no conviction can be had.⁴⁹ The state need not show a renewal of the promise at the time of the seduction,⁵⁰ and the promise may have been made some time prior to the act.⁵¹ The defendant's good faith at the time of committing the offense or his honest intention cannot ordinarily be shown as a defense to the action.⁵² An act of intercourse induced simply by mutual desire of the parties to gratify sexual passion is not seduction.⁵³ The state must show a reliance upon such promise and that the act was accomplished because of such promise.⁵⁴ This may

⁴⁴ *State v. Brinkhaus*, 34 Minn. 285, 25 N. W. 642.

⁴⁵ *People v. Kane*, 14 Abb. Pr. (N. Y.) 15.

⁴⁶ *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177; *People v. Kane*, 14 Abb. Pr. (N. Y.) 15; *Wilson v. State*, 58 Ga. 328.

⁴⁷ *Munkers v. State*, 87 Ala. 94, 6 So. 357; *McTyler v. State*, 91 Ga. 254, 18 S. E. 140.

⁴⁸ *People v. Wallace*, 109 Cal. 611, 42 Pac. 159; *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177; *Boyce v. People*, 55 N. Y. 644; *State v. Adams*, 25 Ore. 172, 35 Pac. 36, 42 Am. St. 790.

⁴⁹ *State v. Brown*, 86 Iowa 121, 53 N. W. 92, holds that the defendant's engagement to a third party which, at the time of the alleged seduction, was known to the prosecutrix, may be shown, as a circumstance tending

to prove no promise. *Callahan v. State*, 63 Ind. 198, 30 Am. R. 211; *Wood v. State*, 48 Ga. 192, 15 Am. R. 664.

⁵⁰ *State v. Brassfield*, 81 Mo. 151, 51 Am. R. 234.

⁵¹ *Armstrong v. People*, 70 N. Y. 38.

⁵² *People v. Samonset*, 97 Cal. 448, 32 Pac. 520; *State v. Bierce*, 27 Conn. 319.

⁵³ *O'Neill v. State*, 85 Ga. 383, 11 S. E. 856; *People v. De Fore*, 64 Mich. 693, 31 N. W. 585, 8 Am. St. 863; *State v. Cochran*, 10 Wash. 562, 39 Pac. 155; *Putnam v. State*, 29 Tex. App. 454, 16 S. W. 97, 25 Am. St. 738.

⁵⁴ *State v. Brinkhaus*, 34 Minn. 285, 25 N. W. 642; *Carney v. State*, 79 Ala. 14; *Phillips v. State*, 108 Ind. 406, 9 N. E. 345; *State v. Eckler*, 106 Mo. 585, 17 S. W. 814, 27 Am. St.

be contradicted and the defendant may show that the girl did not rely upon the promise, and this is sometimes done by showing other acts of intercourse in which there was no promise.⁵⁵ It has been held no defense that the promise to marry was secured because of the intercourse.⁵⁶ It is said that the offense consists in having illicit connection under promise of marriage, and that it is enough that a promise was made which was a consideration for or inducement to the intercourse.⁵⁷ But there are well considered authorities to the effect that a promise conditioned on pregnancy resulting from the intercourse is insufficient.⁵⁸ There is some question as to whether the woman may testify that she yielded because of a promise of marriage, but the better opinion seems to be that she may so testify.⁵⁹

§ 3149. *Res gestae*.—The conduct and statements of the parties immediately before and after and at the time of the alleged seduction may generally be shown as explanatory and as part of the *res gestae*.⁶⁰ But evidence of preparations made by the prosecutrix for marriage to the defendant is not admissible as part of the *res gestae*.⁶¹ The contrary view seems to be taken by Mr. Underhill,⁶² but if he means to

372; see also, *Putnam v. State*, 29 Tex. App. 454, 16 S. W. 97, 25 Am. St. 738; *McCullar v. State*, 36 Tex. Cr. App. 213, 36 S. W. 585, 61 Am. St. 847.

⁵⁵ *State v. Brassfield*, 81 Mo. 151, 51 Am. R. 234; *Bowers v. State*, 29 Ohio St. 542.

⁵⁶ *Callahan v. State*, 63 Ind. 198, 30 Am. R. 211; *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177; *Phillips v. State*, 108 Ind. 406, 9 N. E. 345; *Boyce v. People*, 55 N. Y. 644.

⁵⁷ *Callahan v. State*, 63 Ind. 198, 30 Am. R. 211; *Bishop Stat. Crimes*, § 639; see also, *State v. O'Hare*, (Wash.) 79 Pac. 39; *State v. Hughes*, 106 Iowa 125, 76 N. W. 520, 68 Am. St. 288.

⁵⁸ *People v. Van Alstyne*, 144 N. Y. 361, 76 N. E. 520; *People v. Ryan*, 63 App. Div. (N. Y.) 429, 71 N. Y. S. 527; *State v. Adams*, 25 Ore. 172, 35 Pac. 36, 42 Am. St. 790; 22 L. R. A. 840.

⁵⁹ *Ferguson v. State*, 71 Miss. 805,

15 So. 66, 42 Am. St. 492; *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177; *Armstrong v. People*, 70 N. Y. 38; *State v. Brinkhaus*, 34 Minn. 285, 25 N. W. 642.

⁶⁰ *Wood v. State*, 48 Ga. 192, 15 Am. R. 664; *State v. Curran*, 51 Iowa 112, 49 N. W. 1006; *Lewis v. People*, 37 Mich. 518; see also, *State v. Bess*, 109 Iowa 675, 81 N. W. 152; *State v. Elsenhour*, 132 Mo. 140, 33 S. W. 785; *Armstrong v. People*, 70 N. Y. 38; *Harvey v. Territory*, 11 Okla. 156, 35 Pac. 837, as to acts and conduct and the like tending to corroborate the prosecutrix.

⁶¹ *State v. Lenihan*, 88 Iowa 670, 56 N. W. 292; *State v. Buxton*, 89 Iowa 573, 57 N. W. 417; *Cooper v. State*, 90 Ala. 641, 8 So. 821, 24 Am. St. 934; *People v. Tibbs*, 143 Cal. 100, 76 Pac. 904.

⁶² *Underhill Cr. Ev.*, §§ 388, 390; see also, *State v. Timmens*, 4 Minn. 325.

state that such evidence, and that of consultation by her with her parents regarding preparations for the wedding, can be shown against the defendant when the latter had no part therein and no knowledge thereof, the statement seems to be clearly erroneous, and it is criticized in a recent case wherein it is held that such evidence is no part of the *res gestae*, and comes clearly within the rule excluding acts and declarations merely self-serving and of a hearsay nature.⁶³

§ 3150. Admissions.—The defendant's admissions may be used against him.⁶⁴ The boasts of the defendant to his friends that he was guilty of illicit intercourse with the prosecutrix may be shown to prove the act, and the circumstances under which the admissions were made may be brought before the jury as tending to show deceptive practices and the true circumstances by which consent was obtained.⁶⁵ It has also been said that the essential elements of the crime may be proved by the admissions of the defendant himself, including the chaste character of the female and the means by which the seduction was accomplished.⁶⁶ But where the only direct evidence introduced to prove the crime consisted of the testimony of the female, a mere admission by the defendant that the prosecuting witness was a good girl and that he intended to make her his wife was held not to be a sufficient corroboration of her testimony.⁶⁷ Letters of the defendant are admissible, in a proper case, which tend to criminate him.⁶⁸ This is true even where they were written after the commission of the alleged offense, if they are first shown to be the defendant's letters.⁶⁹ In both of the cases cited in the last note below the letters were written by the defendant to the prosecutrix after the alleged seduction.

§ 3151. Circumstantial evidence.—Circumstantial evidence is competent in prosecutions for seduction as in other cases. Evidence of the conduct of defendant toward the prosecutrix before and even

⁶³ *People v. Tibbs*, 143 Cal. 100, 76 Pac. 904.

⁶⁴ *State v. Hill*, 91 Mo. 423, 4 S. W. 121; *Hausenfluck v. Commonwealth*, 85 Va. 702, 8 S. E. 683; *State v. Fitzgerald*, 63 Iowa 268, 19 N. W. 202.

⁶⁵ *State v. Hill*, 91 Mo. 423, 4 S. W. 121; *State v. McClintic*, 73 Iowa 663, 35 N. W. 696; *Bailey v. State*, (Tex. Cr. App.) 30 S. W. 669.

⁶⁶ *Phillips v. State*, 108 Ind. 406, 9 N. E. 345.

⁶⁷ *La Rosae v. State*, 132 Ind. 219, 31 N. E. 798.

⁶⁸ *State v. Bell*, 79 Iowa 118, 44 N. W. 244; *Bracken v. State*, 111 Ala. 68, 20 So. 636, 56 Am. St. 23.

⁶⁹ *Bracken v. State*, 111 Ala. 68, 20 So. 636, 56 Am. St. 23; *McTyler v. State*, 91 Ga. 254, 18 S. E. 140.

after the seduction may be admitted to show whether the consent to the act was accomplished by means of persuasion or promise.⁷⁰ The age, experience, artfulness, or innocent and confiding nature of the prosecutrix may be taken into consideration.⁷¹ Evidence that defendant committed or procured an abortion has been held admissible on the trial as tending to prove guilt.⁷² It has also been held that evidence which shows the animus of the prosecuting witness and that the prosecution is spite work may be introduced.⁷³ Pregnancy and the birth of a child of course show intercourse, and illicit intercourse, if the woman is unmarried, and they may tend, at least with other evidence, to show that she was seduced,⁷⁴ but they do not of themselves tend to show that the defendant was the seducer.⁷⁵ This, however, may be shown by circumstantial evidence, such as that of opportunity and the relation and conduct of the parties.⁷⁶ In a recent case testimony that the mother of the prosecutrix was dead and that the defendant was the father of her child was held relevant, and the court said that the fact that the mother was dead was admissible to show the situation and environment of the prosecutrix, "and to what extent she was protected or subject to the persuasions of the defendant. So, too, as to the evidence relating to the paternity of the child. The fact of its birth was a circumstance in proof of the fact that there had been

⁷⁰ *State v. Curran*, 51 Iowa 112, 49 N. W. 1006; *State v. Hayes*, 105 Iowa 82, 74 N. W. 757; *State v. Hemm*, 82 Iowa 609, 48 N. W. 971; *Powell v. State*, (Miss.) 20 So. 4; *Lewis v. People*, 37 Mich. 518.

⁷¹ *People v. Gibbs*, 70 Mich. 425, 38 N. W. 257; *State v. Higdon*, 32 Iowa 262.

⁷² *State v. Kavanaugh*, 133 Mo. 452, 33 S. W. 33, 34 S. W. 842; *People v. Orr*, 92 Hun (N. Y.) 199, 36 N. Y. S. 398, affirmed in 149 N. Y. 616, 44 N. E. 1127.

⁷³ *State v. Reeves*, 97 Mo. 668, 10 S. W. 841, 10 Am. St. 349; see also, *State v. Eckler*, 106 Mo. 585, 17 S. W. 814, 27 Am. St. 372; *People v. Clark*, 33 Mich. 112.

⁷⁴ *State v. Coffman*, 112 Iowa 8, 83 N. W. 721; see also, *Armstrong v. People*, 70 N. Y. 38; *State v. Hor-*

ton, 100 N. Car. 443, 6 S. E. 232, 6 Am. St. 613.

⁷⁵ *State v. Coffman*, 112 Iowa 8, 83 N. W. 721; *State v. McGinn*, 109 Iowa 641, 80 N. W. 1068; *Armstrong v. People*, 70 N. Y. 38.

⁷⁶ *Polk v. State*, 40 Ark. 482, 48 Am. R. 17; *Armstrong v. People*, 70 N. Y. 38; *State v. Thornton*, 108 Mo. 640, 18 S. W. 841; *Bailey v. State*, 36 Tex. Cr. App. 540, 38 S. W. 185. As to whether the child may be exhibited to jury, see, *People v. Tibbs*, 143 Cal. 100, 76 Pac. 904; *State v. Horton*, 100 N. Car. 443, 6 S. E. 238, 6 Am. St. 613; and compare, *Barnes v. State*, 37 Tex. Cr. App. 320, 39 S. W. 684; *State v. Clemons*, 78 Iowa 123, 42 N. W. 562; *State v. Brassfield*, 81 Mo. 151, 51 Am. R. 234; *Cunningham v. State*, 73 Ala. 51.

sexual intercourse. This had to be established before there could be any conviction for seduction."⁷⁷

§ 3152. **Corroboration.**—The statutes of many states have established certain rules of corroboration necessary before a conviction can be had for seduction. The rules vary to such an extent that the statutes must be consulted in each state.⁷⁸ Some states seem to require a corroboration of every material fact,⁷⁹ others a corroboration of the illicit intercourse and promise⁸⁰ and some of the promise alone.⁸¹ Several states require corroboration to the same extent as in perjury cases.⁸² It is generally recognized that direct and positive proof is seldom obtainable, and the courts allow a wide range of circumstantial evidence to corroborate the evidence of the prosecutrix.⁸³ Where the statute simply requires corroboration without specifically stating upon what points or to what extent it is sometimes said that she must be corroborated on every material point,⁸⁴ but unless the phrase "every material point" is given a restricted meaning the better rule seems to

⁷⁷ *Pike v. State*, (Ga.) 49 S. E. 680.

⁷⁸ *State v. Kingsley*, 39 Iowa 439; *State v. McCaskey*, 104 Mo. 644, 16 S. W. 511; *State v. Curran*, 51 Iowa 112, 49 N. W. 1006; *State v. Smith*, 54 Iowa 743, 7 N. W. 402.

⁷⁹ *Andre v. State*, 5 Iowa 389, 68 Am. Dec. 708; *State v. Kingsley*, 39 Iowa 439; *Munkers v. State*, 87 Ala. 94, 6 So. 357.

⁸⁰ *State v. Bauerkemper*, 95 Iowa 562, 64 N. W. 609; *State v. McCaskey*, 104 Mo. 644, 16 S. W. 511; *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177; *People v. Kearney*, 110 N. Y. 188, 17 N. E. 736; *State v. Ferguson*, 107 N. Car. 841, 12 S. E. 574; *State v. Crawford*, 34 Iowa 40; *State v. Araah*, 55 Iowa 258, 7 N. W. 601.

⁸¹ *State v. Brassfield*, 81 Mo. 151, 51 Am. R. 234; *State v. McCaskey*, 104 Mo. 644, 16 S. W. 511; *Rice v. Commonwealth*, 100 Pa. St. 28; *State v. Hill*, 91 Mo. 423, 4 S. W. 121.

⁸² *Burns Ind. Rev. Stat.*, § 1876; *Za-*

briskie v. State, 43 N. J. L. 640, 39 Am. R. 610; *State v. Reeves*, 97 Mo. 668, 10 S. W. 841; *La Rosae v. State*, 132 Ind. 219, 31 N. E. 798; *Galloway v. State*, 29 Ind. 442, holds that if there is the positive testimony of one witness to the charge of false swearing, the corroborating evidence need not be equivalent to the testimony of a positive witness.

⁸³ *Polk v. State*, 40 Ark. 482, 48 Am. R. 17; *Armstrong v. People*, 70 N. Y. 38; *People v. Kearney*, 110 N. Y. 188, 17 N. E. 736; *State v. Curran*, 51 Iowa 112, 49 N. W. 1006; *State v. McClintic*, 73 Iowa 663, 35 N. W. 696; *State v. Bell*, 79 Iowa 117, 44 N. W. 244.

⁸⁴ *State v. Timmins*, 4 Minn. 325; *State v. Lockerby*, 50 Minn. 363, 52 N. W. 958, 36 Am. St. 656; *Zabriskie v. State*, 43 N. J. L. 640, 39 Am. R. 610; *Andre v. State*, 5 Iowa 389, 68 Am. Dec. 708; see also, *La Rosae v. State*, 132 Ind. 219, 31 N. E. 798; *Hinkle v. State*, 157 Ind. 237, 61 N. E. 196.

be that it is sufficient if she is corroborated as to the fact that the defendant had sexual intercourse with her and obtained her consent by promise of marriage or such other seductive arts as the statute requires, but there must be corroboration as to these facts.⁸⁵ The corroborative evidence may be circumstantial⁸⁶ rather than direct, but it must come from some witness other than the prosecutrix herself.⁸⁷ It has been held in a recent case that testimony of a witness that the defendant told him that he had promised prosecutrix to marry her was a sufficient corroboration of the marriage promise.⁸⁸ In another recent case it is held that the court should, on request, instruct that the prosecutrix must be corroborated by other witnesses as to the promise of marriage and intercourse; and that the mere reading of the statute, with the statement that her testimony must be corroborated, is insufficient.⁸⁹

§ 3153. Defenses.—The unchaste character of the prosecutrix where the statute requires previous chaste character, or her bad reputation for chastity where the statute requires her to be of good reputation, constitutes a good defense, and, as elsewhere stated, may be shown by proper evidence.⁹⁰ So, it may be shown in defense that she voluntarily

⁸⁵ *Polk v. State*, 40 Ark. 482, 48 Am. R. 17; *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177; *People v. Kearney*, 110 N. Y. 188, 17 N. E. 736; *Armstrong v. People*, 70 N. Y. 38; *State v. Curran*, 51 Iowa 112, 49 N. W. 1006; *State v. Crawford*, 34 Iowa 40; *Harvey v. Territory*, 11 Okla. 156, 65 Pac. 837; *Ferguson v. State*, 71 Miss. 805, 15 So. 66, 42 Am. St. 492; see also, *Suther v. State*, 118 Ala. 88, 24 So. 43; *Cunningham v. State*, 73 Ala. 51; *State v. Brown*, 86 Iowa 121, 53 N. W. 92; *State v. Bauerkemper*, 95 Iowa 562, 64 N. W. 609; *State v. Brown*, 64 N. J. L. 414, 45 Atl. 800, 87 Am. Dec. 410, note; *State v. Ferguson*, 107 N. Car. 841, 12 S. E. 574; *Barker v. Commonwealth*, 90 Va. 820, 20 S. E. 776.

⁸⁶ *State v. Lauderbeck*, 96 Iowa 258, 65 N. W. 158; *State v. Brassfield*, 81 Mo. 151, 51 Am. R. 234; *State v. Eisenhour*, 132 Mo. 140, 33

S. W. 785; *State v. Brown*, 64 N. J. L. 414, 45 Atl. 800; *Bailey v. State*, 36 Tex. Cr. App. 540, 38 S. W. 185; *Wright v. State*, 31 Tex. Cr. App. 354, 20 S. W. 756.

⁸⁷ *State v. McGinn*, 109 Iowa 641, 80 N. W. 1068; *State v. Hill*, 91 Mo. 423, 4 S. W. 121; *Cooper v. State*, 90 Ala. 642, 8 So. 821; *Munkers v. State*, 87 Ala. 94, 6 So. 357; *Mills v. Commonwealth*, 93 Va. 815, 22 S. E. 863; *McCullar v. State*, (Tex. Cr. App.) 36 S. W. 585.

⁸⁸ *State v. Phillips*, (Mo.) 83 S. W. 1080; but see, *La Rosae v. State*, 132 Ind. 219, 31 N. E. 798.

⁸⁹ *Keaton v. State*, (Ark.) 83 S. W. 911.

⁹⁰ See, *Mrous v. State*, 31 Tex. Cr. App. 597, 21 S. W. 764; *Parks v. State*, 35 Tex. Cr. App. 378, 33 S. W. 872; *State v. Clemons*, 78 Iowa 123, 42 N. W. 562; *State v. Bige*, 112 Iowa 433, 34 N. W. 518; *Safford v.*

submitted to gratify her own passion,⁹¹ for hire or the like,⁹² and not because of arts, wiles or promise of marriage by the defendant. It has also been held that the defendant may show that he was married or engaged to another woman, and that the prosecutrix knew it,⁹³ or that the defendant and the prosecutrix had illicit intercourse before the time of the alleged promise of marriage,⁹⁴ as tending to show that the alleged seduction was not accomplished through a promise of marriage. But the fact that the prosecutrix had sexual intercourse with other men after her seduction by the defendant is no defense.⁹⁵ Proper evidence legitimately tending to show that the defendant was not the guilty party, or to show the absence of any one or more of the essential elements of the crime is, however, admissible in defense.⁹⁶ In many jurisdictions it is provided by statute that the marriage of the seducer and the woman seduced shall constitute a bar to

People, 1 Park Cr. Cas. (N. Y.) 474, 37 Am. St. 834, note; see also, State v. Thornton, 108 Mo. 640, 18 S. W. 841.

⁹¹ People v. Nelson, 153 N. Y. 90, 46 N. E. 1040; O'Neill v. State, 85 Ga. 383, 11 S. E. 856; Keller v. State, 102 Ga. 506, 31 S. E. 92; People v. De Fore, 64 Mich. 693, 31 N. W. 585, 8 Am. St. 863, and note.

⁹² See, People v. Clark, 33 Mich. 112; State v. Fitzgerald, 63 Iowa 268, 19 N. W. 202; State v. Reeves, 97 Mo. 668, 10 S. W. 841, 10 Am. St. 349; Mrous v. State, 31 Tex. Cr. App. 597, 21 S. W. 764, 37 Am. St. 834.

⁹³ State v. Brown, 86 Iowa 121, 53 N. W. 92; see also, Callahan v. State, 63 Ind. 198. But note that he was a minor too young to make a valid marriage, where the statutes make no limitation as to the age of the defendant. State v. Brock, (Mo.) 85 S. W. 595; People v. Kehoe, 123 Cal. 224, 55 Pac. 911; Kenyon v. People, 26 N. Y. 203, 84 Am. Dec. 177; Harvey v. State, (Tex. Cr. App.) 53 S. W. 102.

⁹⁴ State v. Brassfield, 81 Mo. 151, 51 Am. R. 234; Bowers v. State, 29 Ohio St. 542. But an honest inten-

tion to marry where the promise was made, the defendant afterwards being prevented from performing it, has been held no defense. People v. Samonset, 97 Cal. 448, 32 Pac. 520; State v. Bierce, 27 Conn. 319; but compare, Caldwell v. State, 69 Ark. 322, 63 S. W. 59.

⁹⁵ Bracken v. State, 111 Ala. 68, 20 So. 636; Anderson v. State, 39 Tex. Cr. App. 83, 45 S. W. 15; State v. Gunagy, 84 Iowa 183, 50 N. W. 882. So, where the prosecutrix had other young men come to see her after the alleged seduction has been held immaterial. People v. Tibbs, 143 Cal. 100, 76 Pac. 904; see also, People v. Wade, 118 Cal. 672, 50 Pac. 841; Smith v. State, 118 Ala. 117, 24 So. 55; State v. Abeggian, 103 Iowa 50, 72 N. W. 305; but compare, Keller v. State, 102 Ga. 506, 31 S. E. 92.

⁹⁶ Evidence of a conspiracy on the part of the prosecutrix and her parents to inveigle the defendant into a marriage with her, and failing in that, to prosecute him, has also been held admissible. People v. Clark, 33 Mich. 112.

criminal prosecution for such seduction. This also seems to be the approved rule even in the absence of such a statute where the intercourse is obtained through a promise of marriage and the promise is kept and performed, even though the seducer may have performed the marriage promise to avoid a criminal prosecution.⁹⁷ But this doctrine is denied in a recent case in Kansas, and it is there held that the subsequent marriage of the parties is no defense.⁹⁸ Under a statute of Arkansas providing that, if any man against whom a prosecution has been begun for seduction shall marry the female alleged to have been seduced, the prosecution shall not be terminated, but shall be suspended, provided that if, at any time thereafter, the accused shall desert such female, the prosecution shall be continued, it is held that a prosecution which has been suspended by marriage cannot be renewed upon a separation by mutual consent unless the wife has offered to resume the marital relation and her offer has been refused, but that the prosecution can be revived if her consent to the separation was caused by wrongful conduct on the part of the husband with the intention of forcing her to agree to the separation.⁹⁹

⁹⁷ *State v. Otis*, 135 Ind. 267, 34 N. E. 954, 21 L. R. A. 733; *People v. Gould*, 70 Mich. 240, 38 N. W. 232, 14 Am. St. 493; *Commonwealth v. Elchar*, 4 Clark (Pa.) 551; 2 Wharton Cr. Law, § 1760; 2 Archbold Cr. Pl. Ev. 1825; 5 Lawson Def. Crimes, 780.

⁹⁸ *Lewis, In re*, 67 Kans. 562, 73 Pac. 77, 63 L. R. A. 281; see also, *State v. Bierce*, 27 Conn. 319. That she married some person other than her seducer is not a bar. *Dowling v. Crapo*, 65 Ind. 209.

⁹⁹ *Burnett v. State*, (Ark.) 81 S. W. 382.

CHAPTER CLIV.

TREASON.

Sec.	Sec.
3154. Meaning of term.	3159. No accessories.
3155. Burden of proof.	3160. Res gestae.
3156. Two witnesses essential.	3161. Other overt acts.
3157. Confession of treason—Corroboration.	3162. Defenses.
3158. Levying war.	3163. Evidence in general.
	3164. Misprision of treason.

§ 3154. **Meaning of term.**—Treason is a breach of allegiance to the government, or the offense of attempting to overthrow the government to which the offender owes allegiance; or of betraying the state into the hands of a foreign power.¹ The constitution of the United States provides that treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort, and that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or upon his confession in open court.² Most of the state constitutions also contain a similar provision as to treason against the state. And it is declared that no other acts can be declared to constitute the offense, against the United States. Congress can neither extend nor restrain nor define the crime.³ So, it is said that, being a breach of allegiance, it can be committed by him only who owes allegiance, either perpetual or temporary.⁴ What constitutes levying war against the government is a question which has been the subject of much discussion whenever an indictment has been tried under this article of the constitution. The levying of war is not necessarily to be judged alone by the number or array of troops, but there must be a conspiracy to resist by force and an actual resistance by force

¹ See, *Respublica v. Chapman*, 1 Dall. (U. S.) 53; *Cranburne's Trial*, 13 How. St. Tr. 221, 227; *Vaughan's Trial*, 13 How. St. Tr. 485, 526.

² Const. U. S., Art. 3, § 17.

³ *United States v. Greathouse*, 4 Sawy. (U. S.) 457, 26 Fed. Cas. No. 15254.

⁴ *Young v. United States*, 97 U. S.

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of arms, or intimidation by numbers. The conspiracy and insurrection connected with it must be to effect something of a public nature to overthrow the government, or to nullify some law of the United States and totally to hinder its execution or compel its repeal. A conspiracy to resist by force the execution of a law in particular instances only, a conspiracy for a personal or private, as distinguished from a public and national purpose is not treason however great the violence or force or numbers of the conspirators may be. So, where a number of citizens in a free state collected together to prevent the enforcement of the fugitive slave law and the return of the escaped slave to his master in a slave state, the question whether such individuals were levying war against the United States was submitted to the jury, who found for the defendants.⁵ In most of the several states, treason against the state is defined in the same words, or in language to the same effect; and the same amount of evidence is made necessary to a conviction as by the federal laws, but in a few of the states both the crime and the requisite proof are described with other qualifications.⁶

§ 3155. Burden of proof.—The burden of proof is on the prosecution to prove the crime in its entirety.⁷ And since a treasonable intention and an overt act are requisite components of treason,⁸ the burden of proof to establish these is on the prosecution.⁹ Thus, the burden of proof is on the prosecution to establish that the accused owed allegiance and fidelity to the state against which the treason was committed, and that an overt act was committed by him.¹⁰ In other words, it must be proved to the satisfaction of the jury that the crime in its entirety was committed by the prisoner.¹¹

§ 3156. Two witnesses essential.—In order to convict of treason there must be at least two witnesses, and all other evidence, it has been said, must be rejected unless the overt act charged is proved by two

⁵ Words and Phrases, Vol. 8; see also, *United States v. Hanway*, 2 Wall. Jr. (U. S.) 139, 26 Fed. Cas. No. 15299.

⁶ See the State Constitutions.

⁷ *United States v. Fries*, 3 Dall. (U. S.) 515, 9 Fed. Cas. No. 5126.

⁸ *United States v. Hanway*, 2 Wall. Jr. (U. S.) 139, 169.

⁹ *United States v. Mitchell*, 2 Dall. (U. S.) 348.

⁸ *United States v. Burr*, 4 Cranch (U. S.) 470, 25 Fed. Cas. No. 14693.

¹⁰ *Lisbon v. Lyman*, 49 N. H. 553; *Reg. v. Frost*, 9 Car. & P. 129, 38 E. C. L. 87.

¹¹ *United States v. Fries*, 3 Dall. (U. S.) 515, 9 Fed. Cas. No. 5126; see also, *Reg. v. Frost*, 9 Car. & P. 129, 38 E. C. L. 87; *United States v. Hanway*, 2 Wall. Jr. (U. S.) 139, 169.

witnesses.¹² This rule, it seems did not originally obtain at common law, but was introduced by statute in the sixteenth century,¹³ and reenacted in later statutes. In case the act of treason is that of levying war it is held, however, that one witness to two several component parts of the same act is sufficient, as such act is made up of many separate parts.¹⁴ Our constitution expressly provides that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act of treason or on confession in open court.¹⁵ And the statutes require the testimony of at least two witnesses in order to convict one of treason.¹⁶ But two witnesses are not required to show the intention; the constitution only requires two witnesses to the same overt act, so the treasonable design or intention may be established in other ways.¹⁷ Thus the treasonable intention may be established by the declaration of a party prior to or during the commission of a treasonable act.¹⁸ So, also, by a single fact or act.¹⁹ And also by the conduct of the accused, even though in other places.²⁰ Where it is shown by the testimony of several witnesses that the accused was present and participated in a treasonable conspiracy it has been held that proof by two or more witnesses that he marched as a volunteer with arms and in military array, with a party which actually used force to prevent the execution of an act of congress, is sufficient with-

¹² *United States v. Burr*, 4 Cranch (U. S.) 470, 493, 25 Fed. Cas. No. 14693.

¹³ See, *Bishop Fisher's Trial*, 1 How. St. Tr. 395; *Foster Crown L.* 233; *State Trials for Treason* (Willis-Bund) XXXIX; *Best Ev.*, §§ 616-619.

¹⁴ *United States v. Mitchell*, 2 Dall. (U. S.) 348.

¹⁵ *Const. United States*, Art. III, § 3; *United States v. Burr*, 4 Cranch (U. S.) 25 Fed. Cas. No. 14693; *United States v. Greiner*, 4 Phila. (Pa.) 396, 26 Fed. Cas. No. 15262; *United States v. Fries*, 3 Dall. (U. S.) 515, 9 Fed. Cas. No. 5126; *United States v. Lee*, 2 Cranch (U. S.) 104; *Respublica v. McCarty*, 2 Dall. (U. S.) 86.

¹⁶ *United States v. Fries*, 3 Dall. (U. S.) 515, 9 Fed. Cas. No. 5126.

¹⁷ *United States v. Fries*, 3 Dall. (U. S.) 515, 9 Fed. Cas. No. 5126; *United States v. Lee*, 2 Cranch (U. S.) 104.

¹⁸ *Charge to Grand Jury*, 5 Blachf. (U. S.) 549, 30 Fed. Cas. No. 18271; *United States v. Fries*, 3 Dall. (U. S.) 515, 9 Fed. Cas. No. 5126.

¹⁹ *United States v. Fries*, 3 Dall. (U. S.) 515, 9 Fed. Cas. No. 5126; *Reg. v. Davitt*, 11 Cox Cr. Cas. 676; *Rex v. Gordon*, 2 Dougl. 590.

²⁰ *United States v. Fries*, 3 Dall. (U. S.) 515, 9 Fed. Cas. No. 5126; *United States v. Burr*, 4 Cranch (U. S.) 470, 25 Fed. Cas. No. 14693. It is said, however, that the treasonable intention must be clearly and unequivocally shown. *State v. McDonald*, 4 Port. (Ala.) 449.

out proof by two witnesses that he was actually present when the acts of violence were done.²¹

§ 3157. **Confession of treason—Corroboration.**—One writer thus states the rule as to confession of treason: “Because the statutory requirement under which the testimony of two witnesses to an overt act was necessary to convict one of the crime of treason, it was at one time doubted whether an extra judicial confession was admissible against one on trial for the commission of that crime. It is now the law that while no one can be convicted of treason upon his confession not made in open court, that is, by a plea of guilty to the indictment, his extra judicial confession may be received against, and the confession itself must, to be admissible, be proved by two witnesses.”²² But if an overt act has been proved, where the indictment is laid, the defendant’s confession may be given in evidence to corroborate that proof,²³ and it has been held that when an overt act of treason has been proved by two witnesses the defendant’s confession of another species of treason is admissible as corroborating the same.²⁴ But until the overt act is proved by two witnesses or until there is confession made in open court, evidence in corroboration is not admissible.²⁵

§ 3158. **Levying war.**—The allegation of levying war by an armed assembly may be established by testimony showing such an assemblage for any warlike object in itself amounting to an actual or constructive levying of war, such as, to prevent the execution of a public law.²⁶ It is an act of levying war for such an assemblage to compel the repeal of a law or to alter the law or to expel all the citizens or subjects of a particular country or nation.²⁷ In case the charge is of levying war, it is not necessary to prove that the accused was actually present at the perpetration of the overt act charged; it is sufficient to prove that he was constructively present on that occasion.²⁸ “But if the personal

²¹ *United States v. Mitchell*, 2 Dall. (U. S.) 348.

²² 1 *Underhill Cr. Ev.*, § 142; 1 *Burr’s Trial* 196.

²³ *Respublica v. Roberts*, 1 Dall. (U. S.) 39; *Respublica v. McCarty*, 2 Dall. (U. S.) 86, 89.

²⁴ *Respublica v. McCarty*, 2 Dall. (U. S.) 86, 1 L. Ed. 300.

²⁵ *United States v. Burr*, 4 Cranch (U. S.) 470, 25 Fed. Cas. No. 14693;

United States v. Lee, 2 Cranch (U. S.) 104.

²⁶ *Fries’ Trial*, 196.

²⁷ *Rex v. Gordon*, 2 Doug. 590;

United States v. Burr, 4 Cranch (U. S.) 470, 25 Fed. Cas. No. 14693; *United States v. Greathouse*, 2 Abb. (U. S.) 364; *United States v. Hoxie*, 1 Paine (U. S.) 265.

²⁸ *United States v. Burr*, 4 Cranch (U. S.) 470, 25 Fed. Cas. No. 14693.

co-operation of the accused in the general enterprise was to be afforded elsewhere, at a great distance, and the acts to be performed by him were distinct overt acts, he cannot be deemed constructively present at any acts, except those to which the part he acted was directly and immediately ancillary.”²⁹ Upon this general subject it has been said: “War may be levied not only by taking arms against the government, but under pretense of reforming religion or the laws or of removing evil counsellors or others grievances, whether real or pretended. To resist the government forces by defending a fort against them is levying war, and so is an insurrection with an avowed design to put down all enclosures, all brothels or the like; the universality of the design making it a rebellion against the state and a usurpation of the power of government. But a tumult, with a view to pull down a particular house or lay open a particular enclosure amounts at best to riot, there being no defiance of public government. An insurrection to prevent the execution of an act of congress altogether by force and intimidation is levying war; but forcible resistance to the execution of such an act for a present purpose, and not for a purpose of a public and general character, does not amount to treason; nor does the mere enlistment of men into service. There must be, to constitute an actual levy of war, an assemblage of persons met for a treasonable purpose, and some overt act done, or some attempt made by them, with force, to execute or toward executing that purpose. There must be a present intention to proceed to the execution of the treasonable purpose by force. The assembly must be in a condition to use force, if necessary, to further, or to aid, or to accomplish their treasonable design. If the assembly is arrayed in a military manner for the express purpose of overawing or intimidating the public, and to attempt to carry into effect their treasonable designs, that will, of itself amount to a levy of war, although no actual blow has been struck or engagement has taken place. So, aiding a rebellion by fitting out a vessel to cruise against the government in behalf of the insurgents is levying war, whether the vessel sails or not. So, is a desertion to, or voluntary enlistment in the service of the enemy.”³⁰ And where the indictment

²⁹ *United States v. Burr*, 4 Cranch (U. S.) 470, 494, 25 Fed. Cas. No. 14693.

³⁰ *May Cr. Law*, § 136; *United States v. Mitchell*, 2 Dall. (U. S.) 348; *United States v. Hoxie*, 1 Paine (U. S.) 265; *United States v. Han-*

way, 2 Wall. Jr. (U. S.) 139; *Bollman, ex parte*, 4 Cranch (U. S.) 75; *Burr's Trial*, 401; *United States v. Greathouse*, 2 Abb. (U. S.) 364; *United States v. Hodges*, 2 Wheeler Cr. Cas. (N. Y.) 477.

is for levying war, no testimony relative to the conduct or declarations of the prisoner elsewhere and subsequent to the overt act charged is competent in the absence of proof of the overt act by two witnesses.⁸¹

§ 3159. No accessories.—In treason, all the *participes criminis* are principals. There are no accessories to this crime. Every act, which in the case of felony, would render a man an accessory, will, in the case of treason, make him a principal.⁸²

§ 3160. Res gestae.—As in other cases a declaration, made at the time of the offense was committed is a part of the *res gestae*, and is competent with proof of the overt act.⁸³ So words indicating the prisoner's intention to join the enemy, are proper testimony to explain the motives upon which the intent was afterward carried into effect.⁸⁴ And where defendant was actually with the enemy at one time, words indicating his intention to join them may be shown, though uttered at another time.⁸⁵ So, facts occurring and rumors prevalent in the neighborhood which would explain particulars relied upon to show treasonable occurrence, may be competent.⁸⁶ But where it appeared that the defendant mistook a body of American troops for British and went over to them for the purpose of adhering, it was held that evidence of what he said in regard to his purpose was not admissible, as words do not amount to treason, and there was no overt act which they could explain.⁸⁷

§ 3161. Other overt acts.—There must be an overt act to constitute treason, and the overt act charged in the indictment must be proved, and not some other distinct act. As said in an English case, "a distinct overt act cannot be given in evidence unless it relates to that which is alleged or conduces to the proof of it. But if it conduce to prove the overt act alleged, it is good evidence."⁸⁸ Thus, for the

⁸¹ *United States v. Burr*, 4 Cranch (U. S.) 470, 25 Fed. Cas. No. 14693.

⁸² *Fries' Trial*, 198, per Chase, J.; see also, *Reg. v. Meany*, 10 Cox Cr. Cas. 506; *Trials of Twenty-nine Regicides*, 5 How. St. Tr. 947; *United States v. Mitchell*, 2 Dall. (U. S.) 348; *Homestead Case*, 1 Pa. Dist. Ct. 785.

⁸³ *Respublica v. McCarty*, 2 Dall. (U. S.) 86.

⁸⁴ *Respublica v. Malin*, 1 Dall. (U. S.) 33.

⁸⁵ *Respublica v. Malin*, 1 Dall. (U. S.) 33.

⁸⁶ *United States v. Hanway*, 2 Wall. Jr. (U. S.) 139.

⁸⁷ *Respublica v. Malin*, 1 Dall. (U. S.) 33.

⁸⁸ *Vaughan's Case*, 2 Salk. 634; see also, *Burr's Trial*, 2 Robertson's R. 481; *United States v. Fries*, Whart.

purpose of proving the traitorous intention with which an overt act was committed, it is held that evidence of other overt acts of treason, not laid in the indictment, is competent, provided there is no pending prosecution for those acts.³⁹ Evidence has been admitted of an overt act of treason committed in another county after an overt act is proved to have been committed in the county where the indictment is laid.⁴⁰ But evidence is not competent that the accused joined in the commission of a distinct felony for which he is charged in another indictment, there being no evidence that there was a treasonable intent in the commission of the felony.⁴¹

§ 3162. Defenses.—Ignorance of the law is no defense to a prosecution for treason.⁴² Neither is voluntary intoxication a good defense.⁴³ And the same has been held as to insanity⁴⁴ and infancy⁴⁵ where there is ability to distinguish between right and wrong and the age of discretion has been reached.

§ 3163. Evidence in general.—Allegiance may be established by testimony that the accused was a native born citizen; or that, though an alien, he was a resident here, with his family and effects. And it is said that if he were abroad, leaving his family and effects here, his allegiance to the government is still due for the protection they receive.⁴⁶ Such collateral facts are held sufficiently established if proved by one witness only, since the law requiring two witnesses is limited in its terms to the specific overt act charged.⁴⁷ It has been held, however, that proof of procurement of a warlike assemblage, if admissible to establish a charge of actual presence under an indictment for treason in levying war against the United States, must be made in the same manner and by the same kind of testimony which

St. Tr. 458, 482; 62 L. R. A. 325, note.

³⁹ *Respublica v. Malin*, 1 Dall. (U. S.) 33.

⁴⁰ *Respublica v. Malin*, 1 Dall. (U. S.) 33.

⁴¹ *United States v. Mitchell*, 2 Dall. (U. S.) 348.

⁴² *United States v. Fries*, 3 Dall. (U. S.) 515, 9 Fed. Cas. No. 5126.

⁴³ *Dammaree's Trial*, 15 How. St. Tr. 521, 609.

⁴⁴ *Reg. v. Oxford*, 9 Car. & P. 525, 38 E. C. L. 309.

⁴⁵ *Den v. Banta*, 1 N. J. L. 308.

⁴⁶ *Lisbon v. Lyman*, 49 N. H. 553; see also, *Foster Crown* L. 183; *Carlisle v. United States*, 16 Wall. (U. S.) 147; 1 East P. C. 52, 53; 3 Greenleaf Ev., § 239.

⁴⁷ *State v. White*, 19 Kans. 445; *Selden v. State*, 74 Wis. 277, 42 N. W. 218.

would be required to prove actual presence.⁴⁸ If an overt act has been proved, where the indictment is laid, the defendant's confession may be given in evidence to corroborate that proof.⁴⁹ Among the acts of adhering to or aiding and comforting public enemies may be mentioned the following: Holding a fortress against the state, in order to assist the enemy; joining the enemy; surrendering a fortress to the enemy; liberating prisoners taken from him, and furnishing him with provisions, intelligence, or munitions of war.⁵⁰

§ 3164. Misprision of treason.—Misprision of treason against the United States is when any person having knowledge of the commission of any treason conceals it and does not disclose it to the proper parties.⁵¹ The proof of misprision of treason is regulated by the rule of the common law, as in other cases of crime, in all those states where it has not been changed by statute.⁵² It must generally be shown that the accused had knowledge of the whole offense, that is at least of the design or plot and some of the parties.⁵³ But receiving treasonable letters and keeping them a long time without disclosure has been held admissible as tending to show assent and participation in the treason,⁵⁴ and if one, knowing of the treason, afterward met with the conspirators this, also, is evidence tending to show treason on his part.⁵⁵

⁴⁸ *United States v. Burr*, 4 Cranch (U. S.) 470, 25 Fed. Cas. No. 14693. How. St. Tr. 897, 988; Charge to Grand Jury, 2 Sprague (U. S.) 292,

⁴⁹ *Respublica v. Roberts*, 1 Dall. 30 Fed. Cas. No. 18274.

(U. S.) 39; *Respublica v. McCarty*, ⁵⁰ 3 Greenleaf Ev., § 247.

2 Dall. (U. S.) 86.

⁵¹ *United States v. Hodges*, 2 Wheeler Cr. Cas. (N. Y.) 477; 1 ⁵² *Tonge's Trial*, 6 How. St. Tr. 226; *Trials of Twenty-nine Regicides*, 5 How. St. Tr. 947, 985.

Hale P. C. 146.

⁵³ *Crimes Act*, April 30, 1790, § 2; ⁵⁴ *Francia's Trial*, 15 How. St. Tr. 897, 988, 991.

⁵⁵ 3 Greenleaf Ev., § 238; *Foster Crown L.* 183; *Francia's Trial*, 15 ⁵⁶ *Trials of Twenty-nine Regicides*, 5 How. St. Tr. 947, 985.

CHAPTER CLV.

MISCELLANEOUS OFFENSES.

Sec.	Sec.
3165. Adulteration of food or drink.	3171. Liquor law violations—Intent
3166. Carrying concealed weapons.	—Knowledge—Presump-
3167. Cruelty to animals.	tions.
3168. Incest.	3172. Malicious mischief—Malicious
3169. Libel.	trespass.
3170. Liquor law violations.	3172a. Sodomy.
	3173. Statutory crimes generally—
	Caution.

§ 3165. **Adulteration of food or drink.**—The selling of unwholesome food and provisions, or the mixture of poisonous ingredients in food or drink for individual use and consumption was an indictable offense at common law, even though done through a mere desire of gain, and not from malice.¹ Statutes in many states exist upon the subject of the adulteration of food and drink, and they have, in nearly every instance, been held constitutional as a legitimate exercise of the police power of the state, and as not impairing rights of life, liberty or property.² As a general rule it is not necessary to prove that defendants had knowledge that the article in question was adulterated,³ unless the statute so requires. But this question is often determined

¹ State v. Buckman, 8 N. H. 203, 29 Am. Dec. 646; Roscoe Cr. Ev. 379; Goodrich v. People, 19 N. Y. 574, 577; 3 Park. Cr. Cas. (N. Y.) 622, 627; 2 Russell Crimes 286; Underhill Cr. Ev., § 480.

² State v. Snow, 81 Iowa 642, 47 N. W. 777, 11 L. R. A. 355; State v. Williams, (Minn.) 100 N. W. 641; State v. Sherod, 83 Minn. 417, 83 N. W. 417; State v. Aslesen, 50 Minn. 5, 52 N. W. 220; 36 Am. St. 620; State v. Campbell, 64 N. H. 402, 13 Atl. 585, 10 Am. St. 419; Shivers v. Newton, 45 N. J. L. 469;

People v. West, 106 N. Y. 293, 12 N. E. 610, 60 Am. R. 452; People v. Cipperly, 101 N. Y. 634, 4 N. E. 107.

³ Commonwealth v. Warren, 160 Mass. 533, 36 N. E. 308; Commonwealth v. Evans, 132 Mass. 11; Commonwealth v. Smith, 103 Mass. 444; Commonwealth v. Waite, 11 Allen (Mass.) 264, 87 Am. Dec. 711; Commonwealth v. Nichols, 10 Allen (Mass.) 199; Commonwealth v. Farren, 9 Allen (Mass.) 489; People v. Kibler, 106 N. Y. 321, 12 N. E. 795; People v. West, 106 N. Y. 293, 12 N. E. 610, 60 Am. R. 562.

by the wording of the statute, or the particular section thereof, under which a conviction is sought,⁴ and if the statute makes such knowledge an essential element of the offense it must be proved. Under most statutes, however, it is not an essential element. Thus, on a criminal charge of selling adulterated wines, under the Ohio statute, it is not necessary to a conviction that knowledge of the adulteration be proved beyond a reasonable doubt.⁵ Where the statute does not make the purpose of the sale of adulterated foods and drinks, or the knowledge of their adulteration a part of the crime, neither the purpose nor the knowledge need be proved by the state, nor is either a defense to a charge of selling adulterated foods and wines.⁶ In this class of cases, it is said, the act of the servant is the act of the master, and the latter is generally held liable where the statute is violated and the servant has acted within the scope of his duty.⁷ The defendant's intention to sell may be gathered from his acts and from the time, place and circumstances of their commission, and evidence as to these circumstances is usually competent and admissible either upon the question of intent or upon the question of his possession with intent to sell.⁸ Statutes sometimes designate the method of seizure for analysis, and the making and using of such analysis in evidence. The provisions of the statute must be strictly complied with in order that the analysis may be admissible in evidence;⁹ and where the adulterated substance is seized for analysis under circumstances not contemplated in the statute, the competency of the evidence as to its quality is to be determined, it is said, by rules of common law, and other evidence may usually be received.¹⁰ The defendant may give evidence tending to

⁴ *Commonwealth v. Flannelly*, 15 Gray (Mass.) 195; *People v. West*, 106 N. Y. 293, 12 N. E. 610, 60 Am. R. 452; *People v. Schaeffer*, 41 Hun (N. Y.) 23; *People v. Mahaney*, 41 Hun (N. Y.) 26; *Sanchez v. State*, 27 Tex. App. 14, 10 S. W. 756; *Cantee v. State*, (Tex. App.) 10 S. W. 757.

⁵ *State v. Kelly*, 54 Ohio St. 166, 43 N. E. 163; *Meyer v. State*, 54 Ohio St. 242, 43 N. E. 163; *Bisman v. State*, 54 Ohio St. 242, 43 N. E. 164.

⁶ *State v. Kelly*, 54 Ohio St. 166, 178, 43 N. E. 163.

⁷ *Commonwealth v. Warren*, 160

Mass. 533, 36 N. E. 308; *Commonwealth v. Vieth*, 155 Mass. 442, 29 N. E. 577; *Commonwealth v. Haynes*, 107 Mass. 194; see also, *Meyer v. State*, 54 Ohio St. 242, 43 N. E. 164; *Commonwealth v. Smith*, 143 Mass. 169, 9 N. E. 631.

⁸ *Commonwealth v. Rowell*, 146 Mass. 128, 15 N. E. 154; *Commonwealth v. Smith*, 143 Mass. 169, 9 N. E. 631; but see, *Polinsky v. People*, 73 N. Y. 65.

⁹ *Commonwealth v. Lockhardt*, 144 Mass. 132, 10 N. E. 511.

¹⁰ *Commonwealth v. Holt*, 146 Mass. 38, 14 N. E. 930; *Common-*

impeach the correctness of the analysis,¹¹ or to otherwise show that he is not guilty.

§ 3166. Carrying concealed weapons.—Statutes in many states make it a criminal offense to carry concealed weapons. It is held in a recent case that a person may commit but one such offense, though he carries the weapon from place to place in the presence of different people at the different places, but that whenever the continuity of the act is broken that particular offense is at an end, and another like offense is committed when the weapon is again concealed upon his person.¹² The state must prove the concealment,¹³ as well as the mere fact that a weapon was carried by the defendant, or, in other words, it must be shown that the defendant carried the weapon concealed; but circumstantial, as well as direct evidence is admissible,¹⁴ and it is not necessary for the state, under most statutes, to affirmatively prove that the weapon was loaded,¹⁵ nor the motive or intent of the

wealth v. Coleman, 157 Mass. 460, 32 N. E. 662. Testimony of a witness other than the official inspector is admissible to show adulteration. Commonwealth v. Spear, 143 Mass. 272, 9 N. E. 632. It has been held that a mere rule of evidence is not established by statutes providing that milk shown by analysis to contain less than a certain per cent. of milk solids, etc., shall be deemed adulterated, and that such a statute is not unconstitutional. Shivers v. Newton, 45 N. J. L. 469; People v. Cipperly, 101 N. Y. 634, 4 N. E. 107, rev'g 37 Hun (N. Y.) 319, on grounds of dissenting opinion of Learned, J., in court below; State v. Smyth, 14 R. I. 100, 51 Am. R. 344. Evidence that defendant's cows were properly fed, not being offered for the purpose of discrediting the analysis of the milk put in on behalf of the prosecution, was held to have been properly excluded where defendant was indicted under the New Hampshire statute. State v. Campbell, 64 N. H. 402, 13 Atl. 585, 10 Am. St. 419.

¹¹ State v. Groves, 15 R. I. 208, 2 Atl. 384; People v. Hodnett, 68 Hun (N. Y.) 341, 22 N. Y. S. 809; Shivers v. Newton, 45 N. J. L. 469.

¹² Morgan v. State, 119 Ga. 964, 47 S. E. 567; compare, Smith v. State, 79 Ala. 257; Ladd v. State, 92 Ala. 58, 9 So. 401.

¹³ Ridenour v. State, 65 Ind. 411; Smith v. State, 69 Ind. 140; State v. Johnson, 16 S. Car. 187. As to what is concealment or sufficient evidence thereof, see, Scott v. State, 94 Ala. 80, 10 So. 505; Smith v. State, 96 Ala. 66, 11 So. 71; State v. Bias, 37 La. Ann. 259; State v. Livesay, 30 Mo. App. 633; Williams v. Commonwealth, 18 Ky. L. R. 663, 37 S. W. 680; State v. McMannus, 89 N. Car. 55; Barton v. State, 7 Baxt. (Tenn.) 105; Woodward v. State, 5 Tex. App. 296. For the jury: State v. Lilly, 116 N. Car. 1049, 21 S. E. 563. Opinion of witness held inadmissible, in, Nichols v. State, 100 Ala. 23, 14 So. 539.

¹⁴ Burst v. State, 89 Ind. 133.

¹⁵ State v. Duzan, 6 Blackf. (Ind.) 31; Ridenour v. State, 65 Ind. 411.

defendant in carrying it.¹⁶ It has been held that the state may show that the accused carried the concealed weapon not only on the date charged, but at any time, within the statute of limitations, previous to the date of the information or indictment.¹⁷ Where an essential element of the crime is the concealment of the weapon, or, in other words, the carrying of it concealed, the defendant may show that it was not concealed on the occasion in question.¹⁸ So, it has been held that he may show that it was not carried as a weapon, but for the purpose of having it repaired,¹⁹ or returning it to the owner,²⁰ or the like.²¹ The mere fact that threats had been made against the accused does not constitute a defense to a charge of unlawfully carrying concealed weapons.²² But, while evidence that many lawless men lived in the community, and that the defendant had been advised to go armed is not admissible as a defense,²³ and while vague threats and

The jury may infer that it was loaded if it was carried concealed and as a loaded weapon. See, *Carr v. State*, 34 Ark. 448; see also, *State v. Bollis*, 73 Miss. 57, 19 So. 99; *State v. Wardlaw*, 43 Ark. 73.

¹⁶ *Walls v. State*, 7 Blackf. (Ind.) 572; *State v. Judy*, 60 Ind. 138; see also, *Strahan v. State*, 68 Miss. 347, 8 So. 844, *State v. Martin*, 31 La. Ann. 849.

¹⁷ *Schrimsher v. State*, (Tex. Cr. App.) 80 S. W. 1013.

¹⁸ *State v. Roten*, 86 N. Car. 701; *Smith v. State*, 69 Ind. 140; *Plummer v. State*, 135 Ind. 308, 34 N. E. 968; *Stockdale v. State*, 32 Ga. 225. But not that it was his habit to carry it openly rather than concealed. *Washington v. State*, 36 Ga. 242.

¹⁹ *Pressler v. State*, 19 Tex. App. 52; *Boissean v. State*, (Tex.) 15 S. W. 118.

²⁰ *State v. Brodmax*, 91 N. Car. 543; *State v. Roberts*, 39 Mo. App. 47.

²¹ See, *State v. Gilbert*, 87 N. Car. 527; *State v. Harrison*, 93 N. Car. 605; *State v. Murray*, 39 Mo. App. 127; *Carr v. State*, 34 Ark. 448;

Mangum v. State, 15 Tex. App. 362; *Christian v. State*, 37 Tex. 475; but see, *Cutsinger v. Commonwealth*, 7 Bush (Ky.) 392; *Goldsmith v. State*, 99 Ga. 253, 25 S. E. 624; *State v. Woodfin*, 87 N. Car. 526; *Walls v. State*, 7 Blackf. (Ind.) 572.

²² *House v. State*, 139 Ala. 132, 36 So. 732; see also, *Carroll v. State*, 28 Ark. 99, 18 Am. R. 538; *Brown v. State*, 72 Ga. 211; *State v. Speller*, 86 N. Car. 697; *Coffee v. State*, 4 Lea (Tenn.) 245; *State v. Workman*, 35 W. Va. 367, 14 S. E. 9, 14 L. R. A. 600. But evidence of threats well calculated to impress him with reasonable apprehension of an attack upon his life at the time may be admissible in some cases and under some statutes. See, *Bailey v. Commonwealth*, 11 Bush (Ky.) 688; *Sudduth v. State*, 70 Miss. 250, 11 So. 680; *Coleman v. State*, 28 Tex. App. 173, 12 S. W. 590. As to what evidence is or is not relevant, see, *Ross v. State*, 139 Ala. 144, 36 So. 718; *Elmore v. State*, 140 Ala. 184, 37 So. 156.

²³ *O'Neal v. State*, 32 Tex. Cr. App. 42, 22 S. W. 25; *Dillingham v. State*, (Tex.) 32 S. W. 771; see also, *Hop-*

the like usually constitute no defense,²⁴ yet the threats and circumstances may be of such a character as to be admissible, at least in some jurisdictions, as creating a well founded apprehension of imminent danger to his life.²⁵ The official character of the accused, as that of an officer charged with the duty of preserving the peace, and the fact that he was engaged in the discharge of his duty may also be shown as a defense under most, if not all, statutes.²⁶ Under some of the statutes travelers are also permitted to carry concealed weapons. It is generally held that the state is not required in the first instance to show that the accused was not a traveler, and that it is for the accused in defense to show that he was a traveler.²⁷ This is usually a question for the jury to determine from the evidence²⁸ under proper instructions from the court.

§ 3167. **Cruelty to animals.**—Cruelty to animals is punishable as a crime in most of the states, but it is a statutory rather than a common-law offense, and should not be confounded with malicious mis-

kins v. Commonwealth, 3 Bush (Ky.) 480; Commonwealth v. Murphy, 166 Mass. 171, 44 N. E. 138; but compare, Hardin v. State, 63 Ala. 38.

²⁴ Shorter v. State, 63 Ala. 129; Strother v. State, 74 Miss. 447, 21 So. 147; State v. Speller, 86 N. Car. 697; Coffee v. State, 4 Lea (Tenn.) 245.

²⁵ Dooley v. State, 89 Ala. 90, 8 So. 528; Coleman v. State, 28 Tex. App. 173, 12 S. W. 590; see also, Bailey v. Commonwealth, 11 Bush (Ky.) 688; Sudduth v. State, 70 Miss. 250, 11 So. 680; State v. Workman, 35 W. Va. 367, 14 S. E. 9.

²⁶ State v. Williams, 72 Miss. 992, 18 So. 486; Irvine v. State, 18 Tex. App. 51; Lee, In re, 46 Fed. 59; see also, Lott v. State, 122 Ind. 393, 24 N. E. 156; Lyle v. State, 21 Tex. App. 153, 17 S. W. 425; Beasley v. State, 5 Lea (Tenn.) 705; Miller v. State, 6 Bart. (Tenn.) 449; State v. Wisdom, 84 Mo. 177.

²⁷ Wiley v. State, 52 Ind. 516; Brownlee v. State, (Tex.) 32 S. W.

1043; see also, State v. Williams, 70 Iowa 52, 29 N. W. 801; State v. Julian, 25 Mo. App. 133; Walker v. State, 35 Ark. 386; State v. Maddox, 74 Ind. 105; Territory v. Burns, 6 Mont. 72, 9 Pac. 432; but compare, People v. Pendleton, 79 Mich. 317, 44 N. W. 615.

²⁸ Lawson v. State, (Tex.) 31 S. W. 645; Price v. State, 34 Tex. Cr. App. 102, 29 S. W. 473; Hathcote v. State, 55 Ark. 181, 17 S. W. 721; Stiewell v. State, (Ark.) 12 S. W. 1014; Lott v. State, 122 Ind. 393, 24 N. E. 156; Burst v. State, 89 Ind. 133; see also, as to evidence admissible upon the question, Wilson v. State, 68 Ala. 41; Davis v. State, 45 Ark. 359. But in the recent case of State v. Smith, 157 Ind. 241, 61 N. E. 566, the two Indiana cases as to what constitutes a traveler within the exception to the statute are disapproved, and the court sustained the appeal on the ground that the evidence was insufficient to show the accused to be a traveler within the exception to the statute.

chief, the latter being indictable at common law, while mere cruelty to animals, unless publicly inflicted so as to be a public nuisance, or the like, was not.²⁹ Some of the statutes upon the subject go very far, yet they have generally been held constitutional.³⁰ The term "animal" has been given a comprehensive meaning, and has generally been held to include domestic fowls and the like.³¹ The statutes are given a reasonable construction, however, so as not to interfere with the proper use of the animal, and it has been said that "cruelty in the statute means cruelty without reason."³² But the presumption that one intends the natural consequences of his act has been applied in such cases,³³ and intoxication has been held no defense.³⁴ Under most of the statutes the ownership of the animal need not be alleged,³⁵ but if it is alleged as descriptive of the particular animal it must be proved as alleged.³⁶ Malice or unlawful motive or mischievous intent, as already stated, is not made an essential element of the offense in some states, but if it is it should be proved.³⁷ It may, however, be inferred from circumstances in evidence.³⁸ Parol evidence has been held admissible to show the listing of a dog for taxation,³⁹ and evidence of the value of the animal in the neighborhood or at near and accessible markets has been held competent⁴⁰ where the punishment depended on value.

²⁹ Bishop Stat. Crimes, § 1100.

³⁰ Bland v. People, (Colo.) 76 Pac. 359, 65 L. R. A. 424, and authorities cited in note and opinion; 11 L. R. A. 522, and note; 33 L. R. A. 836; 39 L. R. A. 520.

³¹ Budge v. Parsons, 3 B. & S. 382; Relche v. Smythe, 7 Blatchf. (U. S.) 235; see also, State v. Avery, 44 N. H. 392; Commonwealth v. Whitman, 118 Mass. 458; Benson v. State, 1 Tex. App. 6; State v. Bruner, 111 Ind. 98, 12 N. E. 103; State v. Giles, 125 Ind. 124, 25 N. E. 159.

³² Cornelius v. Grant, 7 Scotch Sess. Cas. 4th ser. Just. 13; see also, State v. Avery, 44 N. H. 392; Commonwealth v. Lufkin, 7 Allen (Mass.) 579; Hunt v. State, 3 Ind. App. 383, 29 N. E. 933.

³³ Commonwealth v. Wood, 111

Mass. 408; see also, Hunt v. State, 3 Ind. App. 383, 29 N. E. 933.

³⁴ State v. Avery, 44 N. H. 392.

³⁵ State v. Brocker, 32 Tex. 611; State v. Bruner, 111 Ind. 98, 12 N. E. 103.

³⁶ State v. Bruner, 111 Ind. 98, 12 N. E. 103; Collier v. State, 4 Tex. App. 12; Darnell v. State, 6 Tex. App. 482.

³⁷ Dover v. State, 32 Tex. 84; Hoak v. State, (Tex.) 26 S. W. 508.

³⁸ Hobson v. State, 44 Ala. 380; Hunt v. State, 3 Ind. App. 383, 29 N. E. 933; State v. Council, 1 Overt. (Tenn.) 305; as to evidence held admissible, see, Brown v. State, 26 Ohio St. 176.

³⁹ Hewitt v. State, 121 Ind. 245, 23 N. E. 83.

⁴⁰ Walker v. State, 89 Ala. 74, 8 So.

§ 3168. **Incest.**—It seems that at common law incest, as such, was not a crime,⁴¹ although it was punished by the ecclesiastical courts.⁴² But it is now denounced as a crime by the statutes of the various states. It is said by Mr. Bishop that it is either an unlawful marriage or a particular form of fornication or adultery.⁴³ As these subjects are treated in other chapters, little, therefore, need be added in this connection. The distinguishing feature of the crime is that it is the intermarriage or carnal copulation without marriage of a man and woman so related to each other that their marriage is prohibited by law. Voluntary confessions of the defendant are generally admissible to show the act.⁴⁴ But the courts generally refuse to sustain a conviction entirely based on uncorroborated confessions of the defendant.⁴⁵ So, it is held in most jurisdictions that if the woman is a consenting party, the accused cannot be convicted on her testimony unless corroborated,⁴⁶ but it is held otherwise where she is in no sense an accomplice.⁴⁷ The relationship and pedigree of the parties, according to what seems the better view, may be shown by reputation,⁴⁸ but the contrary view is taken in a recent case.⁴⁹ Under most of the statutes, as knowledge of the relationship is not made an element of the offense, it need not be averred and proved,⁵⁰ but it has been held otherwise in Indiana.⁵¹ Evidence of previous acts of lascivious familiarity

144. But the exclusion of evidence of value has been held immaterial where proof of value is not required. *Dinwiddie v. State*, 103 Ind. 101, 2 N. E. 290.

⁴¹ *People v. Burwell*, 106 Mich. 27, 63 N. W. 986; *State v. Slaughter*, 70 Mo. 484, 488; *State v. Kessler*, 78 N. Car. 469.

⁴² *Woods v. Woods*, 2 Curt. Ecc. 516; *Blackmore v. Bridger*, 2 Phil. Ecc. 359.

⁴³ *Bishop Stat. Crimes*, § 731.

⁴⁴ *Yeoman v. State*, 21 Neb. 171, 31 N. W. 669; *Bergen v. People*, 17 Ill. 426, 65 Am. Dec. 672.

⁴⁵ *Bergen v. People*, 17 Ill. 426, 65 Am. Dec. 672; *Sauls v. State*, 30 Tex. App. 496, 17 S. W. 1066.

⁴⁶ *Yother v. State*, 120 Ga. 264, 47 S. E. 555; *State v. Streeter*, 20 Nev. 403, 22 Pac. 758; *State v. Kellar*, 8

N. Dak. 563, 80 N. W. 476; *State v. Jarvis*, 20 Ore. 437, 26 Pac. 302, 23 Am. St. 141; *Jackson v. State*, 37 Tex. Cr. App. 612, 40 S. W. 498; but see, *State v. Dana*, 59 Vt. 614, 10 Atl. 1027.

⁴⁷ *Smith v. State*, 108 Ala. 1, 19 So. 306, 54 Am. St. 140; *State v. Chambers*, 87 Iowa 1, 53 N. W. 1090, 43 Am. St. 349; *Mullinix v. State*, (Tex. Cr. App.) 26 S. W. 504.

⁴⁸ *Ewell v. State*, 6 Yerg. (Tenn.) 364; *State v. Bullinger*, 54 Mo. 142; *Bishop Stat. Crimes*, § 735.

⁴⁹ *Elder v. State*, 123 Ala. 35, 26 So. 213.

⁵⁰ *People v. Koller*, 142 Cal. 621, 76 Pac. 500; *Simon v. State*, 31 Tex. Cr. App. 186, 20 S. W. 716, 37 Am. St. 802; *State v. Pennington*, 41 W. Va. 599, 23 S. E. 918.

⁵¹ *Williams v. State*, 2 Ind. 439.

or illicit intercourse between the parties is generally held admissible as tending to show an antecedent probability and disposition to commit the crime.⁵² It has also been held that subsequent acts of the same kind is admissible when they are continuous,⁵³ but this doctrine is more questionable and, in some jurisdictions, such evidence is not admissible, at least where indictments for the later acts are pending;⁵⁴ and where the relationship and intercourse between the parties is established it is generally immaterial that the woman had sexual intercourse with other men.⁵⁵

§ 3169. **Libel.**—The general subject of libel has been treated in another volume of this work, and for that reason, although the treatment was more particularly with reference to libel in civil cases, it is unnecessary to again consider the subject at length. Criminal libel has been defined as⁵⁶ “A publication in print or writing without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, ridicule or contempt.”⁵⁷ The state must prove the following facts: First, the publication by the defendant; second, that the matter published is libelous; third, the intent, and fourth, when the truth is admissible in defense, the falsity of the assertions made.”⁵⁸ The manner of proving the publication and

⁵² *State v. Markins*, 95 Ind. 464, 48 Am. R. 733; *People v. Cease*, 80 Mich. 576, 45 N. W. 585; *People v. Patterson*, 102 Cal. 239, 36 Pac. 436; *Burnett v. State*, 32 Tex. Cr. App. 86, 22 S. W. 47.

⁵³ *Mathis v. Commonwealth*, 11 Ky. L. R. 882, 13 S. W. 360; *Burnett v. State*, 32 Tex. Cr. App. 86, 22 S. W. 47, overruled in, *Clifton v. State*, (Tex. Cr. App.) 79 S. W. 824.

⁵⁴ *Clifton v. State*, (Tex. Cr. App.) 79 S. W. 824; *Lovell v. State*, 12 Ind. 18. Nor is evidence of subsequent improper relations between defendant and another ordinarily competent. *Porath v. State*, 90 Wis. 527, 63 N. W. 1061.

⁵⁵ *State v. Winningham*, 124 Mo. 423, 27 S. W. 1107; *Kidwell v. State*, 63 Ind. 384; *Mathis v. Commonwealth*, 11 Ky. L. R. 882, 13 S. W. 360. So, evidence of her character

is usually inadmissible for the defendant. *Kidwell v. State*, 63 Ind. 384; as to character of defendant, see and compare, *Poyner v. State*, (Tex. Cr. App.) 48 S. W. 516; *People v. Benoit*, 97 Cal. 249, 31 Pac. 1128.

⁵⁶ *Underhill Cr. Ev.*, § 361.

⁵⁷ *People v. Croswell*, 3 Johns. Cas. (N. Y.) 337; *Raker v. State*, 50 Neb. 202, 69 N. W. 749; *People v. Ritchie*, 12 Utah 180, 42 Pac. 209; see also, *Benton v. State*, 59 N. J. L. 551, 36 Atl. 1041. One who circulates a libel may be guilty of the offense denounced by the Michigan statute (Comp. Laws, § 11762), making it a misdemeanor to falsely charge another with the commission of a crime. *Mack v. Sharp*, (Mich.) 101 N. W. 631.

⁵⁸ *Odgers Libel and Slander*, 580.

connecting the defendant therewith is elsewhere considered.⁵⁹ Parol evidence is generally admissible, where necessary, to explain the meaning of the language used, and to identify the persons and objects or matters referred to.⁶⁰ Although malice must be shown, this means malice in the legal rather than the ordinary sense, and it may be inferred from circumstances.⁶¹ The evidence is frequently permitted to take a broad range for the purpose of showing the intention of the accused,⁶² and he may, in most jurisdictions, testify as to his own intention.⁶³ It was formerly held that the jury could only determine the fact of publication by the defendant and the meaning of the words used; and that it was for the court, in libel cases, to then determine whether there was the necessary malicious intent in law.⁶⁴ But the argument of Erskine in the *Dean of St. Asaph's Case*,⁶⁵ and the fact that juries, influenced by this apparently harsh rule taking the case out of their hands often acquitted guilty parties, or found that there was no publication by the defendant, or no such meaning in the words as made them libelous, doubtless influenced parliament in thereafter passing a law leaving the matter to the jury as a question of fact, or a mixed question of law and fact, as in other cases. Constitutional or statutory provisions to this effect are now in force in nearly every jurisdiction. So, the truth of the alleged libelous statement may now be shown by the defendant in a proper case, although the old common

⁵⁹ Vol. III, § 2450; see also, *Commonwealth v. Morgan*, 107 Mass. 199; *Rex v. Beare*, 1 Ld. Raym. 414, 12 Mod. 219; *Boyle v. State*, 6 Ohio C. C. 163; *Giles v. State*, 6 Ga. 276; *State v. Barnes*, 32 Me. 530; *State v. McIntire*, 115 N. Car. 769, 20 S. E. 721; *Rex v. Girdwood*, 1 Leach C. C. 169; *State v. Jeandell*, 5 Harr. (Del.) 475; *Swindle v. State*, 2 Yerg. (Tenn.) 581, 24 Am. Dec. 515.

⁶⁰ *State v. Fitzgerald*, 20 Mo. App. 408; *Dickson v. State*, 34 Tex. Cr. App. 1, 28 S. W. 815; *Commonwealth v. Morgan*, 107 Mass. 199; *State v. Mason*, 26 Ore. 273, 38 Pac. 130; but see, *People v. McDowell*, 71 Cal. 194, 11 Pac. 868.

⁶¹ Even, it seems, from the wilful doing of an unlawful act, such as publishing a libel, naturally calculated to injure another. *State v.*

Brady, 44 Kans. 435, 24 Pac. 948; see also, Vol. III, § 2451.

⁶² See, *Smith v. Commonwealth*, 98 Ky. 437, 33 S. W. 419; *Commonwealth v. Harmon*, 2 Gray (Mass.) 289; *State v. Conable*, 81 Iowa 60, 46 N. W. 759; *People v. Glassman*, 12 Utah 237, 32 Pac. 956; *Benton v. State*, 59 N. J. L. 551, 36 Atl. 1041; *Manning v. State*, (Tex.) 39 S. W. 118; *Duke v. State*, 19 Tex. App. 14.

⁶³ *State v. Clyne*, 53 Kans. 8, 35 Pac. 789; *People v. Stark*, 59 Hun (N. Y.) 51, 12 N. Y. S. 688.

⁶⁴ See, *Rex v. Dean of St. Asaph*, 3 Term R. 428, note; *Rex v. Woodfall*, 5 Burr. 2661; Article in 39 Cent. Law Jour. 360.

⁶⁵ See, Erskine's speech, *Goodrick British Eloquence*; also see, 3 Campbell *Lives of Chief Justices* 432, et seq.; 39 Cent. Law Jour. 360.

law rule did not permit it.⁶⁶ Upon the subject of evidence of the truth of the statement as a defense, it has been said:⁶⁷ "But usually the truth alone is not a sufficient excuse if the libel was published in bad faith and with an intent to injure.⁶⁸ Where the truth is a sufficient justification, the accused is not compelled to prove it beyond a reasonable doubt.⁶⁹ It is enough if upon all the evidence the jury believe his statements are true. And where the evidence for the defendant creates a *prima facie* presumption in the minds of jurors that his statements are true, it is incumbent upon the prosecution to convince them of their falsity beyond all reasonable doubt.⁷⁰ It is only necessary to prove the truth of that part of the publication which is alleged to be libelous.⁷¹ It is not allowable to prove that the matters referred to in the alleged libel were rumored about the neighborhood, and were accepted as the truth by persons who knew the party libeled."⁷² The question has arisen in a number of cases as to the venue and jurisdiction over prosecutions for libel. In a recent case it is held that where the editor of a newspaper writes, prints and mails a libelous newspaper article in one county to be published in another, the offense is consummated in the latter county.^{72*} Indeed, it is generally held

⁶⁶ See, *Odger Libel & Sl.* 388-390; *Underhill Cr. Ev.*, § 365; *Harris Cr. Law* (Force's ed.) 97, note.

⁶⁷ *Underhill Cr. Ev.*, § 365.

⁶⁸ *Barthelemy v. People*, 2 Hill (N. Y.) 248; *State v. Bush*, 122 Ind. 42, 23 N. E. 677; *State v. Lehre*, 2 Brev. (S. Car.) 446; *State v. Lyon*, 89 N. Car. 568; but see, *Gillett Cr. Law*, § 561; see generally, *State v. Haskins*, 109 Iowa 656, 80 N. W. 1063; *Commonwealth v. Bonner*, 9 Metc. (Mass.) 410; *State v. Verry*, 36 Kans. 416, 13 Pac. 838.

⁶⁹ *Manning v. State*, (Tex.) 39 S. W. 118; *State v. Bush*, 122 Ind. 42, 23 N. E. 677; see also, *Drake v. State*, 53 N. J. L. 23, 20 Atl. 747.

⁷⁰ *State v. Bush*, 122 Ind. 42, 23 N. E. 677; *McArthur v. State*, 59 Ark. 431, 27 S. W. 628; *State v. Wait*, 44 Kans. 310, 24 Pac. 354; *Commonwealth v. Rudy*, 5 Pa. Dist. Ct. 270; *Smith v. Commonwealth*, 98 Ky. 437, 33 S. W. 419.

⁷¹ *State v. Wait*, 44 Kans. 310, 24 Pac. 354.

⁷² *Commonwealth v. Place*, 153 Pa. St. 314, 26 Atl. 620; *People v. Jackman*, 96 Mich. 269, 55 N. W. 809; *State v. Hinson*, 103 N. Car. 374, 9 S. E. 552; contra, *Humbard v. State*, 21 Tex. App. 200, 17 S. W. 126. In *Commonwealth v. Snelling*, 32 Mass. 337, 342, the court, by Shaw, C. J., said: "But how is this defense to be made? By proof of the truth of the matter; not his belief of the truth; not his information, nor the strength of the authority on which such belief was taken." The accused will not be permitted to prove the general bad character of the party libeled. *People v. Stokes*, 24 N. Y. S. 727, 30 Abb. N. Cas. 200; contra, by statute in Texas, *Manning v. State*, (Tex.) 39 S. W. 118.

^{72*} *State v. Huston*, (S. Dak.) 104 N. W. 451. See also, *Haskell v. Bailey*, 25 U. S. App. 99, 11 C. C. A.

that although the crime is committed where publication is made, yet if the publication is in a newspaper circulated in different counties it may be deemed to be made in each county into which the newspaper is sent and circulated, even though the paper is printed in another state.^{72**} By the common law, it is said, the sale of each copy is a distinct offense, and the prosecutor may at least elect for which of the distinct offenses he will prosecute.⁷³

§ 3170. Liquor law violations.—Selling intoxicating liquor was not a crime under the old common law, but there are now statutes in nearly every jurisdiction not only prohibiting the sale of intoxicating liquors without a license, and making it a criminal offense to do so, but also making it an offense to sell to minors, drunkards, or the like, or to sell at certain places or on certain days or during certain hours, and even the keeping of such liquors with intent to unlawfully sell them is punishable in many states. Statutes upon these subjects, when properly drawn, have generally been upheld as constitutional.^{73*} The question as to how far judicial knowledge will be taken of the intoxicating qualities of certain liquors has already been fully considered.⁷⁴

476, 63 Fed. 249. In some states the matter is determined or regulated largely by statute, but, in most states, the statutory law is the same as the common law.

^{72**} *Commonwealth v. Blanding*, 3 Pick. (Mass.) 304, 15 Am. Dec. 214; *McClain Crim. L.*, § 1058. See also, *Baker v. State*, (Ga.) 25 S. E. 341; *Commonwealth v. Macloon*, 101 Mass. 1, 100 Am. Dec. 89; *Mills v. State*, 18 Neb. 575, 26 N. W. 354; *Rex v. Burdett*, 4 B. & Ald. 95, 6 E. C. L. 404.

⁷³ *Belo v. Wren*, 63 Tex. 721. We quote from the opinion in this case as follows: "The fact that the crime of libel may have been completed by a publication of the paper in Galveston county does not make it any less of a crime to circulate the number containing the alleged libelous article in other places. By the common law the sale of each copy is a distinct offense, and the prosecutor may at least choose for

which of the distinct offenses he will call the guilty party to account. A copy of the paper may first be sold to A., then one to B., and another to C., but, because the publication is completed by selling to A., the government is not bound to select that particular fact as the one upon which it will rely to prove the completion of the offense. It may indict for either of the sales, and it makes no difference which was first in point of time. So, for the same reason, it is unimportant in what place the publication first took place."

^{73*} See, 78 Am. St. 253-255, note; *Bishop Stat. Crimes*, § 989-992, 1056; *Cooley Const. Lim.* (6th ed.) 716-720; see also, *State v. Dollison*, 194 U. S. 445, 24 Sup. Ct. 703, aff'g 68 Ohio St. 688; *Webster v. State*, 110 Tenn. 491, 82 S. W. 180; *People v. Shuler*, (Mich.) 98 N. W. 986.

⁷⁴ See, Vol. I, § 70.

The statute under which the particular case is brought largely determines what must be proved. As a general rule every fact constituting "an indispensable element in the offense must be proved, but no more need be."⁷⁵ Thus, it has been held that a prosecution for being a common seller continuously between specified dates may be sustained, although it appears that, during a part of the time, the defendant had a license.⁷⁶ A single sale without a license is sufficient to constitute the offense of selling without a license,⁷⁷ and it is therefore held that it is unnecessary to show sales without a license during the entire period alleged.⁷⁸ So, although the allegation is precise as to the quantity sold, it is not always essential that the exact quantity should be proved.⁷⁹ It is generally sufficient if the sale of such a quantity is shown as calls for the same punishment as that alleged.⁸⁰ But proof of a transaction which comes short of a sale will not sustain a charge of selling, and it was so held where, although the liquor called for was supplied by the defendant, he refused to accept pay therefor.⁸¹ So, where the name of the purchaser is required to be averred and proved a variance therein will generally be fatal.⁸² Circumstantial evidence, as well as direct evidence, is admissible in such cases.⁸³

⁷⁵ Bishop Stat. Crimes, § 1046; *Murphy v. State*, 28 Miss. 637; *Long v. State*, 56 Ind. 117, 206; *Garst v. State*, 68 Ind. 37; *Massie v. Commonwealth*, 30 Gratt. (Va.) 841.

⁷⁶ *Commonwealth v. Putnam*, 4 Gray (Mass.) 16.

⁷⁷ *McPherson v. State*, 54 Ala. 221; *Dansey v. State*, 23 Fla. 316, 2 So. 692; *People v. Kropp*, 52 Mich. 582, 18 N. W. 368; *State v. Small*, 31 Mo. 197; *Lewis v. Commonwealth*, 90 Va. 843, 20 S. E. 777.

⁷⁸ *State v. Hynes*, 66 Me. 114. So a sale either before a license is obtained or after it has expired is generally unlawful. *Kaiser v. State*, 78 Ind. 430; *Edwards v. State*, 22 Ark. 253; *Commonwealth v. Putnam*, 4 Gray (Mass.) 16; *Commonwealth v. Hamer*, 128 Mass. 76; *Neuman v. State*, 76 Wis. 112, 45 N. W. 30.

⁷⁹ Bishop Stat. Crimes, § 1039; *Bishop Cr. Proc. I*, §§ 488b, 488c.

⁸⁰ *State v. Connell*, 38 N. H. 81; *State v. Moore*, 14 N. H. 451; *Brock v. Commonwealth*, 6 Leigh (Va.) 634; *Schlict v. State*, 31 Ind. 246; *State v. Andrews*, 28 Mo. 17.

⁸¹ *Commonwealth v. Packard*, 5 Gray (Mass.) 101; *Seibert v. State*, 40 Ala. 60; see also, *Maxwell v. State*, 140 Ala. 131, 37 So. 266; but compare, *Ashley v. State*, (Tex. Cr. App.) 80 S. W. 1015.

⁸² *Brown v. State*, 48 Ind. 38; *State v. Wolff*, 46 Mo. 584; *Commonwealth v. Mehan*, 11 Gray (Mass.) 321; *Commonwealth v. Brown*, 2 Gray (Mass.) 358; *Commonwealth v. Shearman*, 11 Cush. (Mass.) 546; *Dyer v. People*, 84 Ill. 624.

⁸³ *State v. Hynes*, 66 Me. 114, 115; *Rater v. State*, 49 Ind. 507; *State v. Cunningham*, 25 Conn. 195; *State v. Wilson*, 5 R. I. 291; *Stone v. State*, 30 Ind. 115; *Needham v. State*, 19 Tex. 332.

Upon this subject the following propositions have been stated by Mr. Bishop:⁸⁴ "Thus, as steps in the path to the conclusion of guilt, such facts may be shown as the presence of liquor in the defendant's place of business, the hustling out of bottles of it on the entrance of the officers of the law, tumblers on the bar, strong beer in the beer-pump;⁸⁵ declarations of the defendant that he had kept and would keep liquor for sale, though not pointing specially to the transaction in controversy;⁸⁶ his assertion that he had deemed the law unconstitutional, and he meant to violate it;⁸⁷ the liquor on tap, and the implements around for measuring and drinking it;⁸⁸ a bar, and bottles in it;⁸⁹ a coming and going with bottles,⁹⁰ especially when they are empty at the entering and full of liquor at the exit.⁹¹ The one competent fact may not be alone sufficient; and, unless all combined satisfy the jury beyond a reasonable doubt, of the defendant's guilt, the case fails.⁹² It is not even permissible to show a mere common report, or public notoriety, that the defendant has sold liquors."⁹³ The statutes, in

⁸⁴ Bishop Stat. Crimes, § 1048.

⁸⁵ Commonwealth v. Cotter, 97 Mass. 336; Commonwealth v. Van Stone, 97 Mass. 548; Vallance v. Everts, 3 Barb. (N. Y.) 553.

⁸⁶ New Gloucester v. Bridgham, 28 Me. 60; State v. Bonney, 39 N. H. 206.

⁸⁷ Commonwealth v. Kimball, 24 Pick. (Mass.) 366.

⁸⁸ Commonwealth v. Levy, 126 Mass. 240.

⁸⁹ People v. Hulbut, 4 Denio (N. Y.) 133; State v. Knott, 5 R. I. 293.

⁹⁰ Commonwealth v. Intoxicating Liquors, 105 Mass. 595; see also, Commonwealth v. Brothers, 158 Mass. 200, 33 N. E. 386; Commonwealth v. Finnerty, 148 Mass. 165, 19 N. E. 215; Pike v. State, 40 Tex. Cr. App. 613, 51 S. W. 395.

⁹¹ State v. Long, 7 Jones L. (N. Car.) 24, 27; Huey v. State, 31 Ala. 349; Pannell v. State, 29 Ga. 681.

⁹² Bishop Cr. Proc. I, §§ 1073-1079; New York v. Walker, 4 E. D. Smith (N. Y.) 258; United States v. Furlong, 2 Biss. (U. S.) 97.

⁹³ Cobleigh v. McBride, 45 Iowa 116. As to what is sufficient to make the principal criminally liable where the sale is made by a clerk or bar-tender, see, 1 Bishop Cr. Proc., §§ 488d, 1096-1101; State v. Tibbetts, 35 Me. 81; Hall v. McKechie, 22 Barb. (N. Y.) 244; State v. Williams, 3 Hill (S. Car.) 91; Selbert v. State, 40 Ala. 60, 63; Sellers v. State, 98 Ala. 72, 13 So. 530; Anderson v. State, 39 Ind. 553; Molihan v. State, 30 Ind. 266; State v. Mahoney, 23 Minn. 181; Thompson v. State, 45 Ind. 495; Anderson v. State, 22 Ohio St. 305; Commonwealth v. Major, 6 Dana (Ky.) 293; Scott v. State, 25 Tex. 168; State v. Bonney, 39 N. H. 206; State v. Foster, 3 Fost. (N. H.) 348; Patterson v. State, 21 Ala. 571; Riley v. State, 43 Miss. 397; Commonwealth v. Kimball, 24 Pick. (Mass.) 366; Commonwealth v. Galligan, 156 Mass. 270, 30 N. E. 1142; Commonwealth v. Rooks, 150 Mass. 59, 22 N. E. 436; Commonwealth v. Putnam, 4 Gray (Mass.) 16; Commonwealth v. Nich-

some of the states, make the delivery of the liquor under specified circumstances, prima facie evidence of a sale, and such statutes have been held constitutional.⁹⁴ So, a statute providing that a licensee who transgresses certain restrictions shall be deemed guilty of selling without a license has been held to be constitutional and valid.⁹⁵ There is some conflict among the authorities as to whether the state is bound to prove in the first instance that the defendant was not licensed or otherwise authorized to sell the liquor. Mr. Bishop gives his own reasons for taking the view that the state is not bound to show this by affirmative evidence, and refers to the authorities on both sides by states.⁹⁶ It is now settled, however, in most jurisdictions, either by statute or judicial decision in the absence of any express statutory provision upon the subject, that the burden is upon the defendant to show his license or authority as a defense,⁹⁷ and the impossibility of obtaining a license or the wrongful refusal of his application therefor is no defense.⁹⁸

§ 3171. Liquor law violations—Intent—Knowledge—Presumptions.—The defendant's intent to unlawfully sell the liquor is an essential element of the offense of keeping liquor for unlawful sale and

ols, 10 Metc. (Mass.) 259; Parker v. State, 4 Ohio St. 563; State v. Hayes, 67 Iowa 27, 24 N. W. 575; State v. Baker, 71 Mo. 475; State v. Kittele, 110 N. Car. 560, 15 S. E. 103, 28 Am. St. 698; People v. Longwell, 120 Mich. 311, 79 N. W. 484.

⁹⁴ Commonwealth v. Williams, 6 Gray (Mass.) 1; Commonwealth v. Rowe, 14 Gray (Mass.) 47; Commonwealth v. Wallace, 7 Gray (Mass.) 222; State v. Hurley, 54 Me. 562; State v. Day, 37 Me. 244; see also, State v. Momberg, (N. Dak.) 103 N. W. 566.

⁹⁵ Crabb v. State, (Fla.) 36 So. 169. But such statutes making certain things prima facie evidence are not usually conclusive, but mean that it is competent and legally sufficient evidence if the jurors are satisfied beyond a reasonable doubt. State v. Momberg, (N. Dak.) 103 N. W. 566; Black Intox. Liquors, § 509.

⁹⁶ Bishop Stat. Crimes, §§1051, 1052, and note.

⁹⁷ In addition to authorities cited by Bishop, see, Orme v. Commonwealth, 21 Ky. L. R. 1412, 55 S. W. 195; State v. Kriechbaum, 81 Iowa 633, 47 N. W. 872; State v. Harlan, 10 Kans. App. 346, 58 Pac. 274; State v. Ahern, 54 Minn. 195, 55 N. W. 959; State v. Emery, 98 N. Car. 668, 3 S. E. 810; State v. Hoxsie, 15 R. I. 1, 22 Atl. 1059, 2 Am. St. 838; State v. Shelton, 16 Wash. 590, 48 Pac. 258.

⁹⁸ State v. Tucker, 45 Ark. 55; Welsh v. State, 126 Ind. 71, 25 N. E. 883; State v. Brown, 41 La. Ann. 771, 6 So. 638; State v. Kantler, 33 Minn. 69, 21 N. W. 856; Brock v. State, 65 Ga. 437; State v. Myers, 63 Mo. 324; State v. Jamison, 23 Mo. 330; Commonwealth v. Blackington, 24 Pick. (Mass.) 352.

must in some manner be shown.⁹⁹ But it is usually impossible to prove it by direct evidence and it may be shown by circumstantial evidence. It may well be inferred that if the defendant has unlawfully sold part of the liquor he meant to sell the rest. It has therefore been held that sales before, after and at the time of the alleged keeping for sale may be shown in proof of the intent to sell.¹⁰⁰ And it may be inferred from many other circumstances. "The jury," it has been said, "might be well satisfied of the fact from the manner in which the liquors were kept in the building, or from the declarations of the defendant in regard to them, or from various circumstances which might be supposed, without its being shown that there had been an offer or attempt to sell."¹⁰¹ There is some apparent conflict among the authorities as to whether the state must show knowledge on the part of the accused where the charge is for unlawfully selling liquor to a minor or to a drunkard. This would seem to depend largely upon the wording and construction of the statute. If the statute makes it an offense only when it is knowingly done, there is little doubt that this should be made to appear.¹⁰² But if the statute does not use the word "knowingly" or its equivalent, the weight of authority seems to be to the effect that ignorance and good faith are no defense.¹⁰³ Where

⁹⁹ 1 Bishop Cr. Proc., § 1101; Commonwealth v. Canny, 158 Mass. 210, 33 N. E. 340. But not necessarily to sell in person. State v. Kaler, 56 Me. 88.

¹⁰⁰ State v. Munzenmaier, 24 Iowa 87; State v. Raymond, 24 Conn. 204; Hans v. State, 50 Neb. 160, 69 N. W. 838; State v. White, 70 Vt. 225, 39 Atl. 1085; State v. Plunkett, 64 Me. 534, 539; State v. Mead's Liquors, 46 Conn. 22; see also, State v. Colston, 53 N. H. 483; Bishop Stat. Crimes, §§ 681, 682; Commonwealth v. Matthews, 129 Mass. 487; People v. Caldwell, 107 Mich. 374, 65 N. W. 213; but see as to evidence of other sales on a charge of selling, Chipman v. People, 24 Colo. 520, 52 Pac. 677; State v. Shaw, 58 N. H. 73; Fossdahl v. State, 89 Wis. 482, 62 N. W. 185.

¹⁰¹ State v. McGlynn, 34 N. H. 422, 427; see also, Commonwealth v.

Hughes, 165 Mass. 7, 42 N. E. 121; Commonwealth v. Gallagher, 124 Mass. 29; Commonwealth v. Timothy, 8 Gray (Mass.) 480; Commonwealth v. Wallace, 123 Mass. 401; State v. Mead's Liquors, 46 Conn. 22; Commonwealth v. Meskill, 165 Mass. 142, 42 N. E. 562; Menken v. Atlanta, 78 Ga. 668, 2 S. E. 559.

¹⁰² See, Williams v. State, 23 Tex. App. 70, 3 S. W. 661; Schurzer v. State, (Tex. Cr. App.) 25 S. W. 23 (burden on state); Brow v. State, 103 Ind. 133, 2 N. E. 296; Perry v. Edwards, 44 N. Y. 223.

¹⁰³ Commonwealth v. Gould, 158 Mass. 499, 33 N. E. 656; Commonwealth v. Julius, 143 Mass. 132, 8 N. E. 898; State v. Sasse, 6 S. Dak. 212, 60 N. W. 853, 55 Am. St. 834; Redmond v. State, 36 Ark. 58; State v. Baer, 37 W. Va. 1, 16 S. E. 368, and other authorities cited in 17 Am. & Eng. Ency. of Law 335; but

the consent of the minor's parent is a defense under the statute, the burden is held to be upon the seller to show it.¹⁰⁴ Where the charge was for selling liquor to be drunk on the premises, it was held that if the purchaser drank the liquor on the premises without objection from the seller, it was a fair presumption that it was sold to be drunk there,^{104*} or was with the seller's consent.¹⁰⁵ So, where the seller furnished bottles, glasses, sugar and water, with the liquor it was held that the jury were justified in inferring the intent that the liquor should be drunk where sold.¹⁰⁶ In prosecutions under any of these statutory provisions it is generally held that the sale may be proved by an informer.¹⁰⁷

§ 3172. Malicious mischief—Malicious trespass.—Malicious mischief is the wilful and malicious injury to or destruction of the property of another,¹⁰⁸ and there are now statutes in most of the states defining the offense of malicious mischief or malicious trespass, some of which have considerably extended the scope or limits of the com-

see, *Whitton v. State*, 37 Miss. 379; *Freiberg v. State*, 94 Ala. 91, 10 So. 703; *Ross v. State*, 116 Ind. 495, 19 N. E. 451; *Kreamer v. State*, 106 Ind. 192, 6 N. E. 341; *Aultfather v. State*, 4 Ohio St. 467; *Fielding v. State*, (Tex. Cr. App.) 52 S. W. 69. But the burden to show good faith may be upon the accused. *Marshall v. State*, 49 Ala. 21; *Fehn v. State*, 3 Ind. App. 568, 29 N. E. 1137; *Farbach v. State*, 24 Ind. 77.

¹⁰⁴ *Farrall v. State*, 32 Ala. 557; *Edgar v. State*, 37 Ark. 219; *Monroe v. People*, 113 Ill. 670; *Reynolds v. State*, 32 Tex. Cr. App. 36, 22 S. W. 18; *Hannaman v. State*, (Tex. Cr. App.) 33 S. W. 538; see also, *Randall v. State*, 14 Ohio St. 435; *Reich v. State*, 63 Ga. 616, 620; as to other questions of evidence in such cases, see, *Commonwealth v. Nagle*, 157 Mass. 554, 32 N. E. 861; *State v. Austin*, 74 Minn. 463, 77 N. W. 301, holding evidence of other sales inadmissible. *Ehlert v. State*, 93 Ind. 76; *Bain v. State*, 61 Ala. 75; Com-

monwealth v. O'Brien, 134 Mass. 198; *State v. Cain*, 9 W. Va. 559, all as to evidence of age.

^{104*} *Sanderlin v. State*, 2 Humph. (Tenn.) 315.

¹⁰⁵ *Casey v. State*, 6 Mo. 646; *Lucker v. Commonwealth*, 4 Bush (Ky.) 440.

¹⁰⁶ *Sanderlin v. State*, 2 Humph. (Tenn.) 315.

¹⁰⁷ *Commonwealth v. Murphy*, 155 Mass. 284, 29 N. E. 469; *Evanston v. Myers*, 172 Ill. 266, 50 N. E. 204; *People v. Curtis*, 95 Mich. 212, 54 N. W. 767; *People v. Rush*, 113 Mich. 539, 71 N. W. 863; *Rater v. State*, 49 Ind. 507; but see, *People v. Braisted*, 13 Colo. App. 532, 58 Pac. 796; *Walton v. Canon City*, 14 Colo. App. 352, 59 Pac. 840.

¹⁰⁸ 19 Am. & Eng. Ency. of Law (2nd ed.) 633; *State v. Watts*, 48 Ark. 56; *State v. Robinson*, 3 Dev. & B. L. (N. Car.) 130, 32 Am. Dec. 661; *Flora First Nat. Bank v. Burkett*, 101 Ill. 391.

mon law offense. There is some controversy, however, as to just what kind of property is the subject of the offense. It is distinguished from larceny¹⁰⁹ and also from an ordinary trespass.¹¹⁰ The state must show the injury to the property,¹¹¹ and the malicious intent,¹¹² but the latter may be inferred from the nature of the act and the circumstances of the case,¹¹³ and declarations of the accused may be shown, in a proper case to prove malice.¹¹⁴ In some states the malice must be towards or against the owner and the weight of authority is probably to that effect,¹¹⁵ but there are many authorities to the contrary. The ownership of the property may be proved by parol.¹¹⁶ The value of the property is generally immaterial,¹¹⁷ unless the degree of the crime or penalty depends upon the value.¹¹⁸ As a general rule it may,

¹⁰⁹ See, *Rex v. Ross*, R. & R. C. C. 10; *Hannel v. State*, 4 Ind. App. 485, 30 N. E. 1118; *Pence v. State*, 110 Ind. 95, 10 N. E. 919; *State v. Weber*, 156 Mo. 249, 56 S. W. 729; *State v. Hawkins*, 8 Port. (Ala.) 461, 33 Am. Dec. 294; *State v. Butler*, 65 N. Car. 309.

¹¹⁰ *State v. Robinson*, 3 Dev. & B. L. (N. Car.) 130, 32 Am. Dec. 661; *People v. Smith*, 5 Cow. (N. Y.) 258.

¹¹¹ See, *State v. Watts*, 48 Ark. 56, 3 Am. St. 216; *State v. Foote*, 71 Conn. 741, 43 Atl. 488, as to what injury is sufficient. See also, *State v. McKee*, 109 Ind. 497, 10 N. E. 405.

¹¹² *Dawson v. State*, 52 Ind. 478; *Gaskill v. State*, 56 Ind. 550; *Woodward v. State*, 33 Tex. Cr. App. 554, 28 S. W. 204.

¹¹³ *State v. Enslow*, 10 Iowa 115; *State v. Linde*, 54 Iowa 139, 6 N. E. 168; *Hobson v. State*, 44 Ala. 380; *State v. Toney*, 15 S. Car. 409, 413; *Chappell v. State*, 35 Ark. 345; *Logsen v. State*, 62 Ind. 437, 440; *Commonwealth v. Walden*, 3 Cush. (Mass.) 558; *Harris v. State*, 73 Ga. 41; *Shirley v. State*, (Tex. Cr. App.) 22 S. W. 42; *Brown v. State*, 26 Ohio St. 176; *People v. Olsen*, 6 Utah 284, 22 Pac. 163; but see, *State v. Newby*, 64 N. Car. 23.

¹¹⁴ *Heron v. State*, 22 Fla. 86; *People v. Ferguson*, 119 Mich. 373, 78 N. W. 334; *Underhill Cr. Ev.*, § 305.

¹¹⁵ *State v. Wilcox*, 3 Yerg. (Tenn.) 278, 279; *Hampton v. State*, 10 Lea (Tenn.) 639, 641; *Hobson v. State*, 44 Ala. 380, 381; *Thomas v. State*, 30 Ark. 433; *United States v. Gideon*, 1 Minn. 292; *State v. Latham*, 13 Ired. L. (N. Car.) 33, 35; *Hill v. State*, 43 Ala. 335; *Shirley v. State*, (Tex. Civ. App.) 22 S. W. 42; *Rex v. Shepherd*, 2 Leach C. C. 609, 610; *Rex v. Pearce*, 1 Leach C. C. 594; contra, *Brown v. State*, 26 Ohio St. 176, 183; *Duncan v. State*, 49 Miss. 331; *State v. Doig*, 2 Rich. L. (S. Car.) 179; *Commonwealth v. Williams*, 110 Mass. 401; *Mosely v. State*, 28 Ga. 190; see also, *State v. Phipps*, 95 Iowa 491, 64 N. W. 411. Evidence of ill-will towards prosecuting witness held admissible in *State v. Wideman*, 68 S. Car. 119, 46 S. E. 769.

¹¹⁶ *State v. Brant*, 14 Iowa 180; *State v. Semotan*, 85 Iowa 57, 51 N. W. 1161.

¹¹⁷ *Ashworth v. State*, 63 Ala. 120; *Heron v. State*, 22 Fla. 86.

¹¹⁸ *Walker v. State*, 89 Ala. 74, 8 So. 144; *State v. Heath*, 41 Tex. 426; *Commonwealth v. Cox*, 7 Allen (Mass.) 577.

perhaps, be said that any proper evidence tending to show that the accused was acting in good faith, or under a misapprehension of his rights, is relevant.¹¹⁹ Thus, it has been held that it is a good defense to show that the act was properly done in the discharge of official duty,¹²⁰ or by authority of the owner,¹²¹ or in the necessary protection of property against trespassing animals or the like,¹²² but the mere fact that the animal was running at large, or even trespassing has been held to be no defense if the injury was malicious.¹²³

§ 3172a. Sodomy.—Sodomy, or “the infamous crime against nature,” as the older writers call it, is the carnal knowledge or copulation against nature by one human being with another or by a human being with a beast.¹²⁴ Strictly speaking, when the copulation is with a beast the offense is called bestiality or buggery. The term sodomy, how-

¹¹⁹ Underhill Cr. Ev., § 309, citing *Lossen v. State*, 62 Ind. 437; *Palmer v. State*, 45 Ind. 388, 391; *Barlow v. State*, 120 Ind. 56, 58, 22 N. E. 888; *Goforth v. State*, 8 Humph. (Tenn.) 37; *Reg. v. Langford*, 1 Car. & M. 602; *Sattler v. People*, 59 Ill. 68, 70; *State v. Flynn*, 28 Iowa 26, 27; *Commonwealth v. Drass*, 146 Pa. St. 55, 60; 29 Wkly. Notes Cas. 463, 465; *Reg. v. Matthews*, 14 Cox Cr. Cas. 5, 7; *State v. Haney*, 32 Kans. 428, 430, 4 Pac. 831.

¹²⁰ *Schott v. State*, 7 Tex. App. 616; *North Carolina v. Vanderford*, 35 Fed. 282.

¹²¹ *Ashworth v. State*, 63 Ala. 120; *Mettler v. People*, 135 Ill. 410, 25 N. E. 748. So presumed where wife was owner. *Adkin v. Pillen*, (Mich.) 100 N. W. 176.

¹²² *Wright v. State*, 30 Ga. 325, 76 Am. Dec. 656; *Thomas v. State*, 14 Tex. App. 200; *Smith v. Williams*, 56 J. P. 840. Or that the accused believed himself to be the owner and had taken legal advice. *State v. Sears*, Phil. L. (N. Car.) 146; *People v. Kane*, 142 N. Y. 366, 37 N. E. 104; *People v. Stevens*, 109 N. Y. 159, 16 N. E. 53; see also, *Windsor*

v. State, 13 Ind. 375; *Hughes v. State*, 103 Ind. 344, 2 N. E. 956; *Dawson v. State*, 52 Ind. 478.

¹²³ *Cryer v. State*, 36 Tex. Cr. App. 621, 38 S. W. 203; *Branch v. State*, 41 Tex. 622; see also, *Bennefield v. State*, 62 Ark. 365, 35 S. W. 790; *Snap v. People*, 19 Ill. 80, 68 Am. Dec. 582; *State v. Brigman*, 94 N. Car. 888; *Thompson v. State*, 67 Ala. 106, 42 Am. R. 101. Evidence as to habits of animal held admissible in *Reedy v. State*, 22 Tex. App. 271, 2 S. W. 591. Evidence of former offenses held inadmissible in *Smith v. State*, (Tex. Cr. App.) 24 S. W. 27.

¹²⁴ *Abbott's Law Dict.* 484; 25 Am. & Eng. Ency. of L. (2d ed.) 1144; *Bac. Alr., Lit. Sodomy*; 1 East's P. C. C. 14, § 1; *Prindle v. State*, 31 Tex. Cr. App. 551, 21 S. W. 360, 37 Am. St. 833; *Houselman v. People*, 168 Ill. 172, 48 N. E. 304; *State v. Chandonette*, 10 Mont. 280, 25 Pac. 438. If committed against the order of nature it makes no difference whether the other party is a man or a woman. *Adams v. State*, (Tex. Cr. App.) 86 S. W. 334; *Lewis v. State*, 36 Tex. Cr. App. 37, 35 S. W. 372, 61 Am. St. 831.

ever, is generally used as including both forms of the crime against nature.¹²⁵ Statutes upon the subject exist in most states, but the offense is not always defined and where such is the case and the statute merely denounces the offense in general terms, the common law is usually looked to for the definition. Penetration is an essential element of the crime, but the slightest penetration is sufficient,¹²⁶ and it may be proved by circumstantial evidence.¹²⁷ Actual emission is not now regarded as essential.¹²⁸ The consent of the victim, whether of age or not, is no defense,¹²⁹ but if the latter is below the age of discretion the act as to him may not be a criminal offense, although it is as to the other party.¹³⁰ The nature of the evidence, however, and the rules relating thereto, as to the actual commission of the offense are, in the main, the same as in the case of rape.¹³¹ In most jurisdictions, the testimony of the other party, at least when he is old enough to be considered an accomplice and does not act under coercion must be corroborated in order to sustain a conviction.¹³² A confession of guilt

¹²⁵ See *Anonymous*, 12 Coke 36; *Ansman v. Veal*, 10 Ind. 355, 71 Am. Dec. 331. So is the term buggery.

¹²⁶ *Hodges v. State*, 94 Ga. 593, 19 S. E. 758; *Cross v. State*, 17 Tex. App. 476; 1 East's P. C. C. 10, § 3; 1 Hale's P. C. 628; *Rex v. Reepspear*, 1 Moody, 342.

¹²⁷ *Collins v. State*, 73 Ga. 76; *Cross v. State*, 17 Tex. App. 476. See also, *Brauer v. State*, 25 Wis. 413.

¹²⁸ *Rex v. Cozins*, 6 P. & C. 351, 25 E. C. L. 434; *People v. Hodgkin*, 94 Mich. 27, 53 N. W. 794, 34 Am. St. 321; *State v. Vicknair*, 52 La. Ann. 1921, 28 So. 273; *State v. Gray*, 8 Jones L. (N. Car.) 170; *Williams v. State*, 14 Ohio 222, 45 Am. Dec. 536; *Commonwealth v. Thomas*, 1 Va. Cas. 307.

¹²⁹ See, *Reg. v. Jellyman*, 8 C. & P. 604, 34 E. C. L. 547; *Reg. v. Lock*, 12 Cox Cr. Cas. 244; *People v. Miller*, 66 Cal. 468, 6 Pac. 99; *Mascola v. Monteranto*, 61 Conn. 50, 23 Atl. 714, 29 Am. St. 170; *Commonwealth v. Snow*, 111 Mass. 411; *Territory*

v. Mahaffy, 3 Mont. 112; *People v. Deschesserl*, 69 App. Div. (N. Y.) 217, 74 N. Y. S. 761.

¹³⁰ See, *State v. Gruss*, 28 La. Am. 952; 1 East's P. C., c. 14, § 2.

¹³¹ *Cross v. State*, 17 Tex. App. 476. "The evidence is the same as in rape, with two exceptions: (a) It is not necessary to prove the offense to have been committed without the consent of the person upon whom it was perpetrated. (b) Both parties, if consenting, are equally guilty; but if one of the parties is a boy under the age of fourteen years, it is a felony in the other only." *Harris' Crim. B.* (Forces' ed.) 149.

¹³² *Commonwealth v. Snow*, 111 Mass. 411; *Territory v. Mahaffey*, 3 Mont. 112; *Medis v. State*, 27 Tex. App. 194, 11 S. W. 112, 11 Am. St. 192; *Reg. v. Jellyman*, 8 C. & P. 604, 34 E. C. L. 547. But it is otherwise in Illinois. *Houselman v. People*, 168 Ill. 174, 48 N. E. 304; *Kelly v. People*, 192 Ill. 119, 61 N. E. 425. And one who acts under coercion may not be an accomplice within

may be shown, where it is voluntary and there is evidence of the corpus delicti;¹³³ but it must be shown to be voluntary, and it has been held that testimony of the police officer, before whom a written confession was made, that he told the defendant that "any statement he might make might be used in evidence either for or against him," was not a sufficient predicate for the admission of the confession.¹³⁴ Evidence of the defendant's good character has been held admissible.¹³⁵ So, on the other hand, on the trial of a prosecution for assault with intent to commit sodomy upon another while on a moving train, evidence of a prior assault by the defendant while on the same train an hour or two before was held competent on behalf of the prosecution, although it was committed in another state, for the purpose of showing the defendant's real intention in making the assault in question.¹³⁶

§ 3173. Statutory crimes generally—Caution.—In determining what must be proved in order to sustain a conviction under an indictment for a statutory offense, and, indeed, to some extent in determining the relevancy of evidence generally in such cases, the particular statute under which the prosecution is instituted must be consulted. The essential elements of the offense are usually determined by such statute, and, in some instances, the defense is largely determined in the same way. So, as shown in the preceding sections, the statute often makes certain facts *prima facie* evidence of guilt or at least of one or more of the essential elements of the crime. These statutes vary considerably in their terms, and it is therefore not only impossible to lay down any general rules for all jurisdictions, but is also unsafe to rely upon the adjudications in one jurisdiction as always applicable in other jurisdictions or under other statutes. Caution must be observed to note the differences in the statutes, and what has been said in the preceding sections of this chapter must be understood, in the main, as confined to the particular statute under consideration and not as a statement of general rules and principles to be safely applied in all cases.

the rule. *People v. Miller*, 63 Cal. 468; *Mascolo v. Monteranto*, 61 Conn. 50, 23 Atl. 714, 29 Am. St. 170.

¹³³ See, *Bradford v. State*, 104 Ala. 68, 16 So. 107, 53 Am. St. 24; *State v. Vicknair*, 52 La. Ann. 1921, 28 So. 273.

¹³⁴ *Adams v. State*, (Tex. Cr. App.) 86 S. W. 334, citing a number of other Texas decisions.

¹³⁵ *People v. Bahr*, 74 N. Y. App. Div. 117, 77 N. Y. S. 443.

¹³⁶ *State v. Place*, 5 Wash. 773, 32 Pac. 736.

EVIDENCE IN EQUITY PROCEEDINGS.

CHAPTER CLVI.

PROCEEDINGS IN EQUITY GENERALLY.

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|---|--|
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§ 3174. Rules of evidence much the same as at law.—The rules of evidence are, in the main, the same in equity as at law.¹ It is only in a few particular instances that they differ to any great extent. These, it is said, are either the investigation of frauds, or trusts, or cases growing out of the peculiar nature of the proceedings.² But the admission of evidence that might be considered fatal error at law, has sometimes been held harmless in equity,³ and there are some respects in which the rules in equity are peculiar, notably, the effect given to an answer under oath, in response to a bill calling for such an answer.⁴ So, in most jurisdictions there is no right to a jury trial in equity cases. Some instances of the application in equity of various general rules of evidence will be referred to, but this chapter will be devoted, in the main, to a consideration of peculiar features in the rules of evidence in equity and to incidental matters of practice in equity, and particular attention will be given to the practice in the Federal Courts.

§3175. No right to jury—Province of court—Advisory verdict. The common-law right to trial by jury is preserved and guaranteed

¹ Morrison v. Hart, 2 Bibb (Ky.) 4; Dwight v. Pomeroy, 17 Mass. 303, 9 Am. Dec. 148; Eveleth v. Crouch, 15 Mass. 307; Stevens v. Cooper, 1 Johns. Ch. (N. Y.) 425, and authorities cited in next note below. The burden of proof is generally the same, Pusey v. Wright, 31 Pa. St. 387. See also, Cochran v. Blout, 161 U. S. 350, 16 Sup. Ct. 454. But see, Jones v. Thomas, 2 Y. & C. 498; Gibson v. Jeyes, 6 Ves. 266, 278; Story Eq. Jur., §§ 311–314.

² See, Manning v. Lechmere, 1 Atk. 453; Man v. Ward, 2 Atk. 228; Reed v. Clarke, 4 T. B. Mon. (Ky.) 18, 20; Greenleaf Ev., § 250. Parol evidence is, perhaps, more often admitted in such cases than in cases where there is a writing.

³ See, Small v. Harrington, (Idaho)

79 Pac. 461; National &c. Asso. v. Burr, 57 Neb. 437, 77 N. W. 1098; King v. Pony Gold Mine Co., 28 Mont. 74, 72 Pac. 309; Sawyer v. Campbell, 130 Ill. 186, 22 N. E. 458; McDonald v. Jacobs, 85 Ala. 64, 4 So. 605; Barker v. Ray, 2 Russ. 63.

⁴ So, testimony is more often taken in equity by means of depositions or in writing, and there are peculiar rules as to cross-interrogatories, discovery, and the number of witnesses required in certain cases, although some of these have been adopted at law under the modern practice or statutes. It seems, too, that in some equity cases the evidence is required to be clearer or more satisfactory than in ordinary cases at law.

by the constitution of the United States, and by the constitutions of the several states. This constitutional provision, however, is generally construed as preserving the right in substance as it existed at common law and only in the classes of cases to which it was applicable at common law. It does not, therefore, extend to equity cases.⁵ The court may, however, submit questions of fact to the jury in the exercise of its discretion.⁶ But, unless the statute or constitution gives such right, a party is not entitled, as a matter of right, to have any question submitted to a jury in any equity case.⁷ And even when questions of fact are submitted to a jury by the court in such cases, the verdict of the jury is merely advisory and not binding upon

⁵ *Goodyear v. Providence Rubber Co.*, 2 Cliff. (U. S.) 351; *Loftus v. Fischer*, 113 Cal. 286, 45 Pac. 328; *State v. Churchill*, 48 Ark. 426; *Hughes v. Hanna*, 39 Fla. 365, 22 So. 613; *Heacock v. Hosmer*, 109 Ill. 245; *Helm v. First Nat. Bank*, 91 Ind. 44; *Monnett v. Turple*, 132 Ind. 482, 32 N. E. 328; *Peden v. Cavins*, 134 Ind. 494, 34 N. E. 7, 39 Am. St. 276; *Hull v. Bell*, 54 Ohio St. 228, 43 N. E. 584; *O'Day v. Conn.* 131 Mo. 321, 32 S. W. 1109; *Lucken v. Wichman*, 5 S. Car. 411; *Phimpton v. Somerset*, 33 Vt. 283; *Mead v. Walker*, 17 Wis. 189; see also, *Leach v. Kundson*, 97 Iowa 643, 66 N. W. 913; *Lynch v. Metropolitan &c. Co.*, 129 N. Y. 274, 29 N. E. 315, 26 Am. St. 523; *Carroll v. Deimel*, 95 N. Y. 252; *Morgan v. Field*, 35 Kans. 162, 10 Pac. 448; *Sumner v. Jones*, 27 Minn. 312, 7 N. W. 265. For states in which it is provided that there shall be a right to a jury in equity cases, see, 3 *Greenleaf Ev.* (16th ed.), §§ 264-266 and notes. See also, *Bell v. Woodward*, 48 N. H. 437; *Franklin v. Greene*, 2 Allen (Mass.) 519; *Dudley v. Dudley*, 176 Mass. 34, 56 N. E. 1011; *Whitted v. Fuquay*, 127 N. Car. 68, 37 S. E. 141; *Marvin v. Dutcher*, 26 Minn. 391, 4 N. W. 685;

Loan &c. Bank v. Peterkin, 52 S. Car. 236, 29 S. E. 546, 68 Am. St. 900.

⁶ *Henry v. Mayer*, (Ariz.) 53 Pac. 590; *Phillips v. Edsall*, 127 Ill. 535, 20 N. E. 801; *MacLellan v. Seim*, 57 Kans. 471, 46 Pac. 959; *Blakey v. Johnson*, 13 Bush (Ky.) 197, 26 Am. R. 254, 256; *Baker v. Safe Deposit &c. Co.*, 93 Md. 368, 48 Atl. 920; *Ely v. Coontz*, 167 Mo. 371, 67 S. W. 299; *Lewis v. North*, 62 Neb. 552, 87 N. W. 312; *Peckham v. Van Bergen*, 8 N. Dak. 595, 80 N. W. 759; *Carlisle v. Foster*, 10 Ohio St. 198; *Palmer v. Lawrence*, 5 N. Y. 389; *Raymond v. Flavel*, 27 Ore. 219, 40 Pac. 158; *Frank's Appeal*, 59 Pa. St. 190; *Hammond v. Foreman*, 43 S. Car. 264, 21 S. E. 3. See, *Reese v. Youtsey*, 113 Ky. 839, 69 S. W. 708.

⁷ *Keith v. Henkleman*, 173 Ill. 137, 50 N. E. 692; *Detroit Nat. Bank v. Blodgett*, 115 Mich. 160, 73 N. W. 120, 885; *Cole v. Bean*, 1 Ariz. 377, 25 Pac. 538; *Cornett v. Combs*, 21 Ky. L. R. 837, 53 S. W. 32; *McBride v. Stradley*, 103 Ind. 465, 2 N. E. 358; *Sharmer v. McIntosh*, 43 Neb. 509, 61 N. W. 727; *Lucken v. Wichman*, 5 S. Car. 411; *Pairo v. Bethell*, 75 Va. 825, and authorities cited in first note to this section.

the chancellor or court.⁸ In a recent case in an action to quiet title and enjoin the defendants, the court, treating the case as having both legal and equitable issues, proceeded with the trial by a jury stating that if it appeared that the case was wholly equitable, the jury might be considered as merely advisory. The jury found a verdict for the defendant as to each parcel of land, and under instructions, brought in a special verdict, in which separate findings were made as to each defendant, all being in harmony with the general verdict and judgment. On appeal it was held that there was no such irregularity as would warrant a reversal.⁹ It has also been held that where the same judge before whom the jury trial was had on certain issues acted as chancellor in making the decree in the suit in equity and relied upon the same proofs, a previous order for the trial by jury and a certificate of the result by such judge to himself as chancellor were unnecessary, although it would have been more formal if the court in equity had ordered a jury to be impaneled on the law side of the court and the verdict had been certified by the clerk to the equity side.¹⁰ And in the same case it was held that where the chancellor submits issues to a jury for his own information and adopts the finding as satisfactory to him upon the whole evidence, the court on appeal will not consider formal exceptions to rulings on the evidence in the course of the trial before the jury.¹¹ As said in another case: "Where a court of chancery suspends proceedings in a cause in order to allow the parties to bring an action at law to try the legal right, it does not assume to interfere with the course

⁸ *Pittenger v. Pittenger*, 208 Ill. 582, 70 N. E. 699; *Maynard v. Richards*, 166 Ill. 466, 46 N. E. 1138; *Platter v. Elkhart*, 103 Ind. 360, 2 N. E. 544; *Seisler v. Smith*, 150 Ind. 88, 46 N. E. 993; *Blick v. Williams*, 181 Mo. 526, 80 S. W. 885; *Curtis v. Kirkpatrick*, (Idaho) 75 Pac. 760; *Brownlee v. Martin*, 21 S. Car. 392; *Hall v. Linn*, 8 Colo. 264, 5 Pac. 641; *Bentley v. Davidson*, 74 Wis. 420, 43 N. W. 139; *Idaho &c. Improvement Co. v. Bradbury*, 132 U. S. 509, 10 Sup. Ct. 177; *Barnes v. Stuart*, 1 Y. & C. 119, 139. This is also held intimated in most of the cases cited

in the preceding notes to this section.

⁹ *Toltec Ranch &c. v. Cook*, 24 Utah 453, 67 Pac. 1123. In a very similar case it was held that it was an equity case and that a trial by jury was properly refused. *Miller v. Indianapolis*, 123 Ind. 196, 24 N. E. 228.

¹⁰ *Wilson v. Riddle*, 123 U. S. 608, 8 Sup. Ct. 255. As to the latter practice see, *Kerr v. South Park Comr's*, 117 U. S. 379, 6 Sup. Ct. 801.

¹¹ See also, *Brockett v. Brockett*, 3 How. (U. S.) 691; *Watt v. Starke*, 101 U. S. 247; *Johnson v. Harmon*, 94 U. S. 371.

of proceedings in the court of law, and a motion for new trial must be made to that court; but where it directs an issue to be tried at law, a motion for a new trial must be made to the court of chancery; and for that purpose the party applying for a new trial must procure notes of the proceeding and of the evidence given at the trial for the use of the chancellor. This is done either by having the proceedings and evidence reported with the verdict, or by moving the chancellor to send to the judge who tried the issue, for his notes of trial; or procuring a statement of the same in some other way. The chancellor then has before him the evidence given to the jury, and the proceedings at the trial, and may be satisfied, by an examination thereof, that the verdict ought not to be disturbed. The evidence and proceedings then become a part of the record, and go up to the court of appeal if an appeal is taken."¹²

§ 3176. **Submitting issues to jury.**—As indicated in the last preceding section, where courts of equity and courts of law are entirely separated, the case is usually sent to the law court by the court of equity,¹³ when it determines to have certain issues submitted to a jury for an advisory verdict, or to the law side where the same court has an equity side and a law side each distinct from the other. But in many of the states the same court exercises both law and equity jurisdictions, without any separation, and may call a jury whenever it sees fit. In either case issues should not be submitted to the jury where they are immaterial¹⁴ or there is no disputed question of fact to be determined on conflicting evidence.¹⁵ The chancellor usually directs what issues should be submitted,¹⁶ and it is irregular to submit the whole case to the jury without

¹² *Watt v. Starke*, 101 U. S. 247. 250. See also, *Bootle v. Blundell*, 19 Ves. 494, 500; *Barker v. Ray*, 2 Russ. 63, 75.

¹³ See, 2 *Daniell's Ch. Pr.* 1265, 1266 and notes; 1 *Spence Eq. Jur.* 337; 1 *Hoffman Ch. Pr.* 502, 503.

¹⁴ *Fenno v. Primrose*, 125 Fed. 635; *Carter v. Carter*, 82 Va. 624; *Comly v. Waters*, 2 Del. Ch. 72.

¹⁵ *Carradine v. Carradine*, 58 Miss 286, 38 Am. R. 324; *Shoemaker's Estate*, 3 Brewst. (Pa.) 312; *Landis v. Lyon*, 71 Pa. St. 473; *Miller v.*

Wilkins, 79 Ga. 675, 4 S. E. 261; *Doss v. Tyack*, 14 How. (U. S.) 297.

¹⁶ *Barth v. Rosenfeld*, 36 Md. 604; *Dorr v. Tremont Nat. Bank*, 128 Mass. 349; *Ringwalt v. Ahl*, 36 Pa. St. 336; *Black v. Shreve*, 13 N. J. Eq. 455; *Black v. Lamb*, 12 N. J. Eq. 108; *Jackson v. Spivey*, 63 N. Car. 261; *Moore v. Simpson*, 5 Litt. (Ky.) 49; *Trimmer v. Liles*, 58 S. Car. 284, 36 S. E. 652. As shown by these authorities it may frame the issues and even give directions as to evidence and the like.

specifying the object of inquiry or requiring any specific finding as to particular facts by the jury.¹⁷

§ 3177. **Effect of verdict.**—As the verdict of the jury is merely advisory, where the right of submission to a jury is not given by the statute or the constitution, the court may either adopt or reject it according as it appears to be satisfactory and in accordance with the chancellor's views of the evidence or otherwise.¹⁸ But it is said that if it is adopted by the court it has the conclusive effect of a final adjudication,¹⁹ although it is also held that the parties are entitled to the opinion of the court itself and that it is error for the court to simply enter a decree on the jury's verdict without exercising any judgment of its own.²⁰ So, although the verdict is regarded as advisory rather than binding, it has been held that it is entitled to weight and that the disapproval and finding of the chancellor, contrary to the verdict may be reviewed on appeal and reversed if there has been an abuse of discretion or the finding is clearly wrong.²¹

¹⁷ *Milk v. Moore*, 39 Ill. 584; *Lake Erie &c. R. Co. v. Griffin*, 92 Ind. 487; *Hulley v. Chedic*, 22 Nev. 127, 36 Pac. 783, 58 Am. St. 729; *Brewster v. Bours*, 8 Cal. 501; *Hall v. Doran*, 6 Iowa 433; *Greene v. Harris*, 11 R. I. 5; see also, *Dunn v. Dunn*, 11 Mich. 284; *Brandt v. Wheaton*, 52 Cal. 430.

¹⁸ *Henry v. Mayer*, (Ariz.) 53 Pac. 590; *Hinkle v. Hinkle*, 55 Ark. 583, 18 S. W. 1049; *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630; *McDonald v. Thompson*, 16 Colo. 13, 26 Pac. 146; *Brady v. Yost*, 6 Idaho 273, 55 Pac. 542; *Biggerstaff v. Biggerstaff*, 180 Ill. 407, 54 N. E. 333; *Brundage v. Deschler*, 131 Ind. 174, 29 N. E. 921; *Acker v. Leland*, 109 N. Y. 5, 15 N. E. 743; *Arnold v. Sinclair*, 12 Mont. 248, 29 Pac. 1124; *Wilson v. Wilson*, 142 Pa. St. 572, 21 Atl. 985; *Lowe v. Traynor*, 6 Coldw. (Tenn.) 633; *Hull v. Watts*, 95 Va. 10, 27 S. E. 829; *Powers v. Large*, 75 Wis. 494, 43 N. W. 1120, 17 Am. St. 195; *Clyde v. Richmond &c. Co.*, 18 C. C.

A. 467, 72 Fed. 121; *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. 298, and other authorities cited ante, § 3175, notes 7, 8.

¹⁹ *Clink v. Thurston*, 47 Cal. 21; *Wilson v. Ward*, 26 Colo. 39, 56 Pac. 5.3; *Kammermeyer v. Hilz*, 116 Wis. 313, 92 N. W. 1107. But see, *Saylor v. Hicks*, 36 Pa. St. 392. Compare, *Peckham v. Armstrong*, (R. I.) 40 Atl. 419.

²⁰ *Fisher v. Carroll*, 46 N. Car. 27. See also, *McNaughton v. Osgood*, 114 N. Y. 574, 21 N. E. 1044; *Brownlee v. Martin*, 21 S. Car. 392; *Farmers' Bank v. Butterfield*, 100 Ind. 229; *Vickers v. Buck Stove &c. Co.*, 65 Kans. 97, 68 Pac. 1081.

²¹ *Miller v. Wills*, 95 Va. 337, 28 S. E. 337; *Grigsby v. Weaver*, 5 Leigh (Va.) 197; *Humphreys v. Ward*, 74 N. Car. 784; *McDaniel v. Marygold*, 2 Iowa 500, 65 Am. Dec. 786; *Orgain v. Ramsay*, 3 Humph. (Tenn.) 580. But see, *F. Meyer Boot &c. Co. v. Shenkberg Co.*, 11 S. Dak. 620, 80 N. W. 126.

§ 3178. Competency—Mode of taking testimony and making proof. The same rules as to competency apply, in general, in equity as at law.²² But when interest was a disqualification the courts of equity were sometimes more inclined to hear interested parties than were the courts of law. It is provided by acts of Congress that in the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action, because he is a party to or interested in the issue tried. But in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects it is provided that the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law and in equity and admiralty.²³ It is also provided that the mode of proof in causes of equity and of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the Supreme Court, except as herein especially provided.²⁴ And in a more recent statute there is a provision to the effect that in addition to the mode of taking the depositions of witnesses in causes pending at law or equity in the district and circuit courts of the United States, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held.²⁵ The section providing that the practice, pleadings, forms and modes of proceeding in the courts of the United States in civil causes at law shall conform as near as may be to those of the state court does not apply to equity cases, and it has been held that although depositions of the adverse parties

²² Foster Fed. Pr., § 274, citing *Cornett v. Williams*, 20 Wall. (U. S.) 226.

²³ U. S. Rev. Stat., §§ 858, 1977. *James v. Atlantic &c. Co.*, 3 Cliff. (U. S.) 614; *De Beaumont v. Webster*, 71 Fed. 226, 81 Fed. 535.

²⁴ U. S. Rev. Stats., § 862. *Hanks Dental Assn. v. International Tooth Crown Co.*, 194 U. S. 303, 24 Sup. Ct. 700.

²⁵ 27 Stat. at Large 7; U. S. Comp. St. 1901, p. 664. Depositions may also be taken *de bene esse*. U. S. Rev. Stat., § 863, et seq.; 1 Story Eq. Pl., § 307; Foster Fed. Pr., §§ 278, 280. Or to perpetuate testimony, Foster Fed. Pr., § 279, et seq.; U. S. Rev. Stat., § 866, et seq.; 2 Desty Fed. Proc., § 385, et seq.

are taken "as under cross-examination" pursuant to a state statute, yet by so doing the party taking and using such depositions made the adverse parties his own witnesses, and, while not concluded by their evidence, cannot properly contend in a United States court, that they were unworthy of credit.²⁶ Under the old chancery practice, the evidence and the proceedings generally were required to be made part of the record²⁷ and the evidence was taken secretly on commission or before an examiner, and not viva voce in open court, and was not made public until publication passed.²⁸ But, while evidence is still usually taken more often before an examiner or by depositions than viva voce in open court, yet witnesses are now sometimes examined orally and even in open court at the hearing. The matter is largely regulated by statutes. The tendency is to do away to a greater or less degree with the old distinctions between the manner of making proof in equity and that of making proof or taking testimony at law, especially in regard to taking depositions.²⁹

§ 3179. United States equity rules.—Pursuant to the authority vested in the Supreme Court of the United States, rules of practice for the courts of equity of the United States have been promulgated by that court. In the main they follow closely the practice of the English chancery courts, and one of the rules provides that in so far as the rules prescribed by the United State Supreme Court or by the circuit courts, not inconsistent therewith, do not apply, the practice of the High Court of Chancery in England shall furnish analogies to regulate the practice.³⁰ In so far as these rules relate to evidence and the practice in taking testimony and making proof, the substance of all that are deemed important will be stated in the following sections.

²⁶ *Dravo v. Fabel*, 132 U. S. 487, 10 Sup. Ct. 170.

²⁷ See, *Mason v. Bair*, 33 Ill. 194; *Smith v. Newland*, 40 Ill. 100; *Bennett v. Welch*, 15 Ind. 332; *Chambers v. Cochran*, 18 Iowa 159; *McIntyre v. Ledward*, Smed. & M. Ch. (Miss.) 91.

²⁸ See, 2 *Daniell Ch. Pr.* (1st ed.), c. 20; 1 *Daniell Ch. Pr.* (6th ed.) 837, et seq., 945, 946.

²⁹ See, *Kelly v. Wayne Co. Cir. Judge*, 90 Mich. 264, 51 N. W. 278; *Payne v. Danley*, 18 Ark. 441, 68

Am. Dec. 187; *Maher v. Bull*, 39 Ill. 531; *Wallen v. Cummings*, 187 Ill. 451, 58 N. E. 1095; *Blease v. Garlington*, 92 U. S. 1.

³⁰ U. S. Eq. Rule 90. So in Florida, *Long v. Anderson*, (Fla.) 37 So. 216, 219; *Kahn v. Weinlander*, 39 Fla. 210, 22 So. 653. There are also other States that adopt the practice in the United States courts of equity so far as applicable, and the practice of the High Court of Chancery, in other respects, so far as applicable.

§ 3180. United States equity rules—Answer as evidence.—If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard to certain specific interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but it may be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his own behalf under section three of the act of Congress of July 2, 1864.²¹

§ 3181. United States equity rules—Commission to take testimony—Oral hearing.—After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time, the commission may issue ex parte. In all cases the commissioner or commissioners may be named by the court or by a judge thereof; and the presiding judge of the court exercising jurisdiction may, either in term time or in vacation, vest in the clerk of the court general power to name commissioners to take testimony. Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court. The examiner, if he so request, shall be furnished with a copy of the pleadings. Such examination shall take place in the presence of the parties or their agents by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, all of which shall be conducted as near as may be in the mode now used in common-law courts. The depositions taken upon such oral examination shall be reduced to writing by the examiner in the form of question put and answer given; provided that, by consent of parties, the examiner

²¹ Amendment to U. S. Eq. Rule an answer as evidence will be fully
41. See, 13 Wall. XI. The effect of considered in subsequent sections.

may take down the testimony of any witness in the form of narrative. At the request of either party, with reasonable notice, the deposition of any witness shall, under the direction of the examiner, be taken down either by a skillful stenographer or by a skillful typewriter, as the examiner may select, and, when taken stenographically, shall be put into typewriting or other writing; provided, that such stenographer or typewriter has been appointed by the court, or is approved by both parties. The testimony of each witness, after such reduction to writing, shall be read over to him and signed by him in the presence of the examiner and of such of the parties or counsel as may attend; provided, that if the witness shall refuse to sign his deposition so taken, then the examiner shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal. The examiner may, upon all examinations, state any special matters to the court as he shall think fair; and any question or questions which may be objected to shall be noted by the examiner upon the depositions, but he shall not have power to decide on the competency, materiality, or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions or parts of them, as may be just. In cases of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories. Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors, or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause. When the examination of witnesses before the examiner is concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record in the same mode as prescribed in section 865 of the revised statutes. Testimony may be taken on commission in the usual way by written interrogatories and cross-interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons satisfactory to the court or judge. Where the evidence to be adduced in a cause is to be taken orally, as before provided, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defense, and a time thereafter within which the complainant shall take his evidence in

reply and no further evidence shall be taken in the cause, unless by agreement of the parties, or by leave of court first obtained, on motion for cause shown. The expense of the taking down of depositions by the stenographer and putting them into typewriting or other writing shall be paid in the first instance by the party calling the witness, and shall be imposed by the court, as part of the costs, upon such party as the court shall adjudge should ultimately bear them. Upon due notice given, as prescribed by previous order, the court may at its discretion permit the whole or any specific part of the evidence to be adduced orally in open court, on final hearing.³²

§ 3182. United States equity rules—Deposition under act of Congress.—Testimony may also be taken in the cause, after it is at issue, by deposition, according to the acts of congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness, either under a commission or by a new deposition taken under the acts of congress, if a court or judge thereof shall, under all the circumstances, deem it reasonable.³³

§ 3183. United States equity rules—Time allowed for taking testimony.—Three months and no more shall be allowed for the taking of testimony after the cause is at issue, unless the court or a judge thereof shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions containing the testimony into the clerk's office, publication thereof may be ordered in the clerk's office, by any judge of the court upon due notice to the parties, or it may be enlarged, as he may deem reasonable under all the circumstances. But by consent of the parties publication of the testimony may at any time pass in the clerk's office, such consent being in writing, and a copy thereof entered in the order book or indorsed upon the deposition or testimony.³⁴ According to the old chancery

³² U. S. Eq. Rule 67 and amendments. See, 139 U. S. 707; 149 U. S. 793; 12 Sup. Ct. 111. See also, *Sickles v. Gloucester Co.*, 3 Wall. Jr. (U. S.) 186; *Clark, In re*, 9 Blatchf. (U. S.) 372.

³³ U. S. Eq. Rule 68.

³⁴ U. S. Eq. Rule 69. See, *Ingle v. Jones*, 9 Wall. (U. S.) 486; *Western Elec. Co. v. Capital & Co.*, 86 Fed. 769; *Mackaye v. Mallory*, 80 Fed. 256. In *Long v. Anderson*,

practice the time for taking testimony was closed by getting an order passing publication, which usually had to be preceded by a rule to produce witnesses.³⁵ But now in England as well as in most of the states the time is fixed by statute or rule. As a general rule evidence should not be taken before there is an issue, and the cause is ready for proof,³⁶ and if taken after the time limited, a deposition will generally be suppressed or excluded, unless the time has been extended.³⁷ But the court may generally extend the time for good cause.³⁸

§ 3184. United States equity rules—Form of last interrogatory. The last interrogatory in the written interrogatories to take testimony, now commonly in use, shall in the future be altered, and stated in substance, thus: "Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer."³⁹

§ 3185. United States equity rules—On reference to master. Upon a reference to a master it shall be the duty of the master, as soon as he reasonably can, after the same is brought before him, to assign a time and place for proceedings in the same, and to give

(Fla.) 37 So. 216, it is held that while it is ordinarily within the discretion of the lower court to give or refuse further time, yet this discretion may be reviewed on appeal, and, under the circumstances of that case the refusal to extend the time was held to be error. In some states the time is fixed at four months. See, *Hart v. Bloomfield*, 66 Miss. 100, 5 So. 620; *Rather v. Williams*, 94 Tenn. 543, 29 S. W. 898.

³⁵ 1 Daniell Ch. Pr. (6th ed.) 946.

³⁶ *Harris v. Moore*, 72 Ala. 507.

³⁷ *Call v. Perkins*, 68 Me. 158; *Abbott v. Alsdorf*, 19 Mich. 157; *Wenham v. Switzer*, 48 Fed. 612; *Wooster v. Clark*, 9 Fed. 854. See also, *Richardson v. Duble*, 33 Gratt.

(Va.) 730; *Hamersly v. Lambert*, 2 Johns. Ch. (N. Y.) 433; *Wood v. Mann*, 2 Sumn. (U. S.) 316, 30 Fed. Cas. No. 17953.

³⁸ *Magbee v. Kennedy*, 26 Fla. 158, 7 So. 529; *Warren v. Bunch*, 80 Ga. 124, 7 S. E. 270; *Becker v. Saginaw Cir. Judge*, 117 Mich. 328, 75 N. W. 885; *Mechanics Labor Sav. Bank, In re*, 10 N. J. L. J. 112; *Shea's Appeal*, 121 Pa. St. 203, 15 Atl. 629, 1 L. R. A. 422; *Ingle v. Jones*, 9 Wall. (U. S.) 486; *Coon v. Abbott*, 37 Fed. 98.

³⁹ U. S. Eq. Rule 71. See also, *Rhoades v. Selin*, 4 Wash. (U. S.) 715; *Dodge v. Israel*, 4 Wash. (U. S.) 323.

due notice thereof to each of the parties or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reasons for any delay.⁴⁰

§ 3186. United States equity rules—Proceedings before master. The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office, or by deposition, according to the acts of congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts and direct all other inquiries and proceedings in the matter before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.⁴¹

§ 3187. United States equity rules—Witnesses before master or examiner.—Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpoena in the usual form, which may be issued by the clerk in blank and filled up by the party praying the same, or by the commissioner, master, or examiner, requir-

⁴⁰ U. S. Eq. Rule 75. See also, ⁴¹ U. S. Eq. Rule 77. See authorities cited under Rule 75, *supra*.
Foot v. Silsby, 3 Blatchf. (U. S.) 507; *Consolidated Fastener Co. v. Columbian &c. Co.*, 85 Fed. 54.

ing the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or to give evidence, it shall be deemed a contempt of the court, which, being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses *viva voce* when produced in open court, if the court shall, in its discretion, deem it advisable.⁴²

§ 3188. United States equity rules—Affidavits and documents. All affidavits, depositions, and documents which have been previously made, read or used in the court, upon any proceeding in any cause or matter, may be used before the master.⁴³

§ 3189. United States equity rules—Examination of creditor or claimant.—The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or on both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court if necessary.⁴⁴

§ 3190. United States equity rules—Accounts—Production—Examination of party.—All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the accounts so brought in shall be at liberty to examine the accounting party, *viva voce*, or upon interrogatories in the master's office, or by deposition, as the master shall direct.⁴⁵

§ 3191. United States equity rules—Master's report—Exceptions. The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by

⁴² U. S. Eq. Rule 78. See, *Erie R. Co. v. Heath*, 8 Blatchf. (U. S.) 413; *Gass v. Stinson*, 2 Sumn. (U. S.) 605.

⁴³ U. S. Eq. Rule 80.

⁴⁴ U. S. Eq. Rule 81. See, *Story v. Livingston*, 13 Pet. (U. S.) 359.

⁴⁵ U. S. Eq. Rule 79.

- the clerk in the order book. The parties shall have one month from the time of filing the report to file exceptions thereto; and if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule day after the month is expired. If exceptions are filed they shall stand for hearing before the court, if the court is then in session; or, if not, then at the next sitting of the court which shall be held thereafter by adjournment or otherwise.⁴⁶

§ 3192. Sources of evidence in equity.—"The sources of evidence in equity," says Professor Greenleaf, "are principally four: namely, first, the intelligence of the court, or the notice which it judicially takes of certain things, and the things which it presumes; secondly, the admissions of the parties contained in their pleadings and agreements; thirdly, documents; and fourthly, the testimony of witnesses."⁴⁷ The first of these has already been sufficiently considered in the first volume of this work. The others, so far as they are not already sufficiently treated or have peculiar features in equity, will be considered in this part of the work.

§ 3193. Admissions generally—Pleadings.—Admissions are either actual or constructive. Actual admissions, it is said, are made either in the pleadings or by agreement, and constructive admissions, are those which are implied from a party's act.⁴⁸ The most ordinary instance of a constructive admission, says Daniell, "is where a plea has been put in by a defendant, either to the whole, or part of the bill, in which case the bill, or that part of it which is pleaded to, so far as it is not controverted by the plea, is admissible to be true. A plaintiff, therefore, where he has replied to a plea, may rest satisfied with that admission, and need not go into evidence as to that part of his case which the plea is intended to cover,—unless the plea is a negative plea; for in that case it will be necessary for him to prove the matter negatived, for the purpose of disproving the plea, in the same manner

⁴⁶ U. S. Eq. Rule 83. See, *Sheffield & Co. v. Gordon*, 151 U. S. 285, 14 Sup. Ct. 343; *Garretson v. Clark*, 15 Blatchf. (U. S.) 70; *St. Colombe v. United States*, 7 Pet. (U. S.) 625; *Gay Mfg. Co. v. Camp*, 15 C. C. A. 67, 68 Fed. 67; *Central Trust Co. v. Georgia Pac. R. Co.*, 83 Fed. 386; *Farrar v. Bernheim*, 21 C. C. A. 136, 75 Fed. 136; *Burke v.*

Davis, 26 C. C. A. 675, 81 Fed. 907; *Pewable Min. Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. 887.

⁴⁷ 3 Greenleaf Ev., § 268. "Evidence consists of admissions upon the record, documents, and the testimony of witnesses." Foster Fed. Pr., § 264.

⁴⁸ Foster Fed. Pr., §§ 265, 266.

§ 3195. **Documents—Discovery.**—The subject of documentary evidence and the production, inspection and authentication of documents has been fully treated in another volume of this work.⁶⁰ It will, therefore, be sufficient in this chapter to call attention to particular rules in equity in regard to proving documents and using them as evidence. The subject of discovery has also been considered,⁶¹ and it has been shown that in most jurisdictions there is no longer any necessity to resort to the old equity bill of discovery. It was also pointed out in the same connection that there is much conflict among the authorities as to whether the statutory mode is exclusive or merely cumulative, but this phase of the subject was not fully treated. In a few jurisdictions it is expressly provided that the remedy by bill of discovery shall still remain, and in others it is expressly abrogated. A majority of the statutes, however, contain no express provision upon the subject. The weight of authority in the state courts and in England is to the effect that they are merely cumulative and do not take away the jurisdiction in equity to proceed by bill of discovery.⁶² But there are decisions of some courts of high standing to the contrary.⁶³ The federal decisions are likewise conflicting.⁶⁴

⁶⁰ See, Vol. II, chap. 59-70.

⁶¹ See Vol. II, chap. 55.

⁶² Wood v. Hudson, 96 Ala. 469, 11 So. 530; Handley v. Heflin, 84 Ala. 600, 4 So. 725; Semple v. Murphy, 8 B. Mon. (Ky.) 271; Union Pass. R. Co. v. Baltimore, 71 Md. 238, 17 Atl. 933; Post v. Toledo &c. R. Co., 144 Mass. 341, 13 N. E. 540, 59 Am. R. 86; Millsaps v. Pfeiffer, 44 Miss. 805; Northrop v. Flaig, 57 Miss. 754; Reynolds v. Burgess Sulphite Fibre Co., 71 N. H. 332, 51 Atl. 1075, 93 Am. St. 535, 57 L. R. A. 949; Wheeler v. Wadleigh, 37 N. H. 55; Miller v. U. S. Casualty Co., 61 N. J. Eq. 110, 47 Atl. 509; Ames v. New Jersey Franklinite Co., 12 N. J. Eq. 66, 72 Am. Dec. 385; Howell v. Ashmore, 9 N. J. Eq. 82, 57 Am. Dec. 371; Block v. Universal Ins. Co., 16 Phila. 72; Milne's Appeal, (Pa.) 2 Atl. 534; Starkweather v. Williams, 21 R. I. 55, 41 Atl. 1003;

Elliston v. Hughes, 1 Head. (Tenn.) 225; Hurricane Tel. Co. v. Mohler, 51 W. Va. 1, 41 S. E. 421; Russell v. Dickeschied, 24 W. Va. 61; Carver v. Pinto Leite, L. R. 7 Ch. App. 90, 41 L. J. Ch. 92, 25 L. T. N. S. 722, 20 Wkly. Rep. 134; Lovell v. Galloway, 17 Beav. 1; Birch v. Mather, L. R. 22 Ch. D. 629, 52 L. J. Ch. 292; Attorney-General v. Gaskill, L. R. 20 Ch. Div. 519.

⁶³ Turnbull v. Crick, 63 Minn. 91, 65 N. W. 135; Leuthold v. Fairchild, 35 Minn. 99, 27 N. W. 503, 28 N. W. 218; Bond v. Worley, 26 Mo. 253; Chapman v. Lee, 45 Ohio St. 356, 13 N. E. 736; Hall v. Joiner, 1 S. Car. 186; Love v. Keowne, 58 Tex. 191; Cargill v. Kountze, 86 Tex. 386, 22 S. W. 1015, 25 S. W. 12, 40 Am. St. 853, 24 L. R. A. 183; Cleveland v. Burnham, 60 Wis. 16, 17 N. W. 126, 18 N. W. 190.

⁶⁴ To the effect that the remedy

§ 3196. **Proof of documents.**—As a general rule, written instruments which do not prove themselves, and the execution of which is not admitted, must be proved by the same evidence in equity as in law.⁶⁵ But, in equity, such evidence, where the practice is not changed, is in most instances, taken by deposition or the like in advance of the hearing. It was the practice in chancery, however, to permit proof *viva voce* at the hearing of the mere execution of an exhibit, not impeached by the pleadings,⁶⁶ and the same practice is recognized and adopted in this country.⁶⁷ So, in some instances, where essential documents had for some excusable cause been omitted in taking proofs the courts allowed them to be proved at the hearing. But in such cases an order must first be obtained for that purpose⁶⁸ and notice given,⁶⁹ and a satisfactory excuse shown for having failed to make the proof in the usual way.⁷⁰ As a general rule, however, documents set out or distinctly referred to in the pleadings and admitted,⁷¹ or of such a character that they prove themselves,⁷² may

provided by statutes is merely cumulative see, *McMullen Lumber Co. v. Strother*, 136 Fed. 295; *Indianapolis Gas Co. v. Indianapolis*, 90 Fed. 196; *Kelley v. Boettcher*, 29 C. C. A. 14, 85 Fed. 55; *National &c. Co. v. Interchangeable &c. Co.*, 83 Fed. 26; *Continental Nat. Bank v. Hellman*, 66 Fed. 184; *Brown v. McDonald*, 133 Fed. 897; *Bryant v. Leyland*, 6 Fed. 125; see also, *Slater v. Banwell*, 50 Fed. 150; *Brown v. Swann*, 10 Pet. (U. S.) 497. To the effect that bills of discovery are abolished see, *Safford v. Ensign Mfg. Co.*, 56 C. C. A. 630, 120 Fed. 480; *Rindskopf v. Platto*, 29 Fed. 130; *Heath v. Erie R. Co.*, 9 Blatchf. (U. S.) 316, 11 Fed. Cas. No. 6307; *Preston v. Smith*, 26 Fed. 884; see also, *Sunset Tel. Co. v. Eureka*, 122 Fed. 960. For citations and reviews of many of the conflicting authorities upon both sides of the subject, see notes in 24 L. R. A. 183, and 41 Am. St. 389; also, 57 L. R. A. 949; 57 Cent. Law Jour. 209.

⁶⁵ 1 Daniell Ch. Pr. 874, 880; *Gresley Eq. Ev. (Am. Ed.)* 118, 119.

⁶⁶ *Lake v. Skinner*, 1 Jac. & W. 9; *Rowland v. Sturgis*, 2 Hare 520; *Wood v. Mann*, 2 Sumn. (U. S.) 316; *Barfield v. Kelly*, 4 Russ. 355, 4 Eng. Ch. 355.

⁶⁷ *Hughes v. Phelps*, 3 Bibb (Ky.) 198; *Wood v. Mann*, 2 Sumn. (U. S.) 316, 30 Fed. Cas. No. 17953; *Foote v. Lefavour*, 6 Ind. 473; *Morton v. White*, 5 Ind. 338; *Pierce v. Prude*, 3 Ala. 65; *Nick v. Rector*, 4 Ark. 251.

⁶⁸ *Bachelor v. Nelson*, Walk. (Mich.) 449; *Pardee v. De Cala*, 7 Paige (N. Y.) 132; *Emerson v. Berkley*, 4 Hen. & M. (Va.) 441; *Chandler v. Neale*, 2 Hen. & M. (Va.) 124.

⁶⁹ *Bachelor v. Nelson*, Walk. (Mich.) 449; *Pardee v. De Cala*, 7 2 Johns. Ch. (N. Y.) 481; 1 Daniell Ch. Pr. (6th ed.) 884.

⁷⁰ *Bachelor v. Nelson*, Walk. (Mich.) 449; *Consequa v. Fanning*, 2 Johns. Ch. (N. Y.) 481.

⁷¹ *Dey v. Dunham*, 2 Johns. Ch. (N. Y.) 182.

⁷² *Bachelor v. Nelson*, Walk. (Mich.) 449; *Pardee v. De Cala*, 7

be read at the hearing without order or further proof; but it seems that documents which are not set out or referred to in the pleadings, although they prove themselves, cannot be so read without at least giving notice of an intention to read them at the hearing.⁷³

§ 3197. Bill as evidence.—As elsewhere shown, a bill may often be read in evidence against the complainant. But it is, ordinarily, not in itself, evidence against the defendant except, perhaps, in certain cases where it is verified and may have the force and effect of an affidavit.⁷⁴ No such rule applies to a bill as that which applies to a responsive answer called for and made under oath. But it is said by Professor Greenleaf that “the bill alone may also sometimes be read by the plaintiff, as evidence against the defendant, of his admission of the truth of the matters therein alleged, and not noticed in his answer. The principle, governing this class of cases, is this, that the defendant, being solemnly required to admit or deny the truth of the allegation, has, by his silence, admitted it.”⁷⁵ As further said by the same author, however, this doctrine applies only to facts either directly charged to be within the knowledge of the defendant, or which may fairly be presumed to be so.⁷⁶ If he replies, instead of excepting, he must generally prove the allegations.⁷⁷ There are cases, however, in which the bill may be taken pro confesso, and in such cases the allegations will be taken as admitted.⁷⁸ And where

Paige (N. Y.) 132. See, 1 Daniell Ch. Pr. (6th ed.) 862, 884.

⁷³ Miller v. Avery, 2 Barb. Ch. (N. Y.) 582; Kellogg v. Wood, 4 Paige (N. Y.) 578. See also, Bennett v. Welch, 15 Ind. 332; Crist v. Bra-shiers, 3 A. K. Marsh. (Ky.) 170; Potorf v. Fishback, 2 A. K. Marsh. (Ky.) 171; but compare, Barrow v. Rhineland, 1 Johns. Ch. (N. Y.) 550.

⁷⁴ As on applications for a temporary injunction or the like.

⁷⁵ 3 Greenleaf Ev., § 276.

⁷⁶ 2 Daniell Ch. Pr. 977, note by Perkins, 5th (Am.) ed., Vol. I. Thorington v. Carson, 1 Port. (Ala.) 257; Kirkman v. Vanlier, 7 Ala. 217; Ball v. Townsend, Litt. Sel. Cas. (Ky.) 325; Mosely v. Gar-

rett, 1 J. J. Marsh. (Ky.) 212; Tobin v. Wilson, 3 J. J. Marsh. (Ky.) 63; Pierson v. Meaux, 3 A. K. Marsh. (Ky.) 4.

⁷⁷ Cochran v. Couper, 1 Harr. (Del.) 200; Wilson v. Kinney, 14 Ill. 27; and in Trenchard v. Warner, 18 Ill. 142; Young v. Grundy, 6 Cranch. (U. S.) 51, it was said in general terms that if the answer neither admits nor denies the allegations in the bill, they must be proved at the hearing, the distinction taken in the text not being adverted to, as the case did not call for it.

⁷⁸ McCambell v. Gill, 4 J. J. Marsh. (Ky.) 87; Atwood v. Harrison, 5 J. J. Marsh. (Ky.) 329; Higgins v. Conner, 3 Dana (Ky.) 1;

the plaintiff reads the defendant's answer in evidence against the defendant, the plaintiff may also read so much of the bill as is necessary to explain the answer.⁷⁹ But, as observed by Mr. Daniell, in strictness this can hardly be called reading the bill in evidence on the part of the plaintiff.

§ 3198. Answer as evidence for defendant.—It is the general rule that the sworn answer of a defendant in equity, so far as it is responsive to the bill and when called for therein, is evidence for him, and is usually conclusive, unless contradicted by two witnesses, or one witness corroborated more or less strongly by circumstances, according to the nature of the case.⁸⁰ It is also sometimes stated

Jones v. Person, 2 Hawks (N. Car.) 269. "In these cases, however, if there is no general order on the subject, it is usual to make a special order, that unless an answer is made within a certain time, the bill will be taken pro confesso." See, *Cory v. Gertcken*, 2 Madd. 40; 1 Daniell Ch. Pr. 569-577, 5th Am. ed. 518-525; 1 Hoffman Ch. Pr., chap. 6, pp. 184-190; 1 Daniell Ch. Pr. (6th ed.) 531, 838.

⁷⁹ *M'Gowen v. Young*, 2 Stew. & P. (Ala.) 160, 176; 1 Daniell Ch. Pr. (6th ed.) 838; see also, *Lancaster v. Arendell*, 2 Heisk. (Tenn.) 434; *Grimes v. Hilliary*, 51 Ill. App. 641; *Walsh v. Agnew*, 12 Mo. 520.

⁸⁰ *McGary v. McDarmott*, 207 Pa. St. 620, 57 Atl. 46; *Campbell v. Patterson*, 95 Pa. St. 447; *Nulton's Appeal*, 103 Pa. St. 286; *Rowley's Appeal*, 115 Pa. St. 150, 9 Atl. 329; *Gleghorne v. Gleghorne*, 118 Pa. St. 383, 11 Atl. 797; *Mason v. Smith*, 200 Pa. St. 270, 49 Atl. 642; *Ringgold v. Bryan*, 3 Md. Ch. 488; *United States Bank v. Beverly*, 1 How. (U. S.) 134; *Carpenter v. Providence &c. Ins. Co.*, 4 How. (U. S.) 185; *Vigel v. Hopp*, 104 U. S. 441; *Morrison v. Durr*, 122 U. S. 518, 7 Sup. Ct. 1215; *West v. Flannagan*,

4 Md. 36; *Brooks v. Thomas*, 8 Md. 367; *Miles v. Miles*, 32 N. H. 147; *Busby v. Littlefield*, 33 N. H. 76; *Williams v. Philpot*, 19 Ga. 567; *Autrey v. Cannon*, 11 Tex. 110; *Calkins v. Evans*, 5 Ind. 441; *Turner v. Knell*, 24 Md. 55; *Clark v. Hackett*, 1 Cliff. (U. S.) 269; *Hayward v. Eliot &c. Bank*, 4 Cliff. (U. S.) 294; *Slessinger v. Buckingham*, 8 Sawy. (U. S.) 569; *Delano v. Winsor*, 1 Cliff. (U. S.) 501; *Bird v. Styles*, 3 C. E. Green (N. J.) 297; *Morris v. White*, 36 N. J. Eq. 324; *Frink v. Adams*, 36 N. J. Eq. 485; *Fulton v. Woodman*, 54 Mass. 158; *Johnson v. Crippen*, 62 Miss. 597; *O'Brian v. Fry*, 82 Ill. 274; *Hurd v. Ascherman*, 117 Ill. 501, 6 N. E. 160; *Croarkin v. Hutchinson*, 187 Ill. 633, 58 N. E. 678; *Heeren v. Kitson*, 28 Ill. App. 259; *Rick v. Neitzzy*, 1 Mackey (D. C.) 21; *Coldiron v. Asheville &c. Co.*, 93 Va. 364, 25 S. E. 238; *Thompson v. Clark*, 81 Va. 422; *Cummins v. Cummins*, 15 Ill. 33; *Reid v. McCallister*, 49 Fed. 16; *Pinney v. Pinney*, (Fla.) 35 So. 95; but this rule is abrogated or modified in some jurisdictions, especially in many of the code states.

that the corroborating circumstances must be equivalent to the testimony of a second witness.⁸¹ But there are cases in which it is held with good reason that, in some instances, the answer may be overcome by documentary evidence, or admissions or even circumstantial evidence.⁸² And there is much force in the reasoning of the Vermont court upon this subject. Thus, in one case it is said: "The general rule in equity upon this subject, as has often been declared, is that two witnesses, or evidence equal to that of two witnesses, is required to overcome the sworn answer of the defendant responsive to the bill. Other authorities say the rule requires one witness with corroborating circumstances. The rule has its basis in the fact that the answer is called out by the orator for his own use. If it admits the fact charged in the bill to be true the orator adopts this admission as sufficient proof of the fact. If the answer denies the fact charged the orator is left to establish it by other means, if he can, and at the same time the denial is evidence for the defendant. . . . But the rule as often announced respecting the effect of the answer as proof is, we think, misleading, as a careful examination of the authorities will show. The weight of evidence does not depend upon the number of witnesses that depose to give facts. The burden of proof, when an answer is responsive to the bill, devolves upon the orator to satisfy the trier that such answer is untrue; but this burden may sometimes be discharged by documentary proof or circumstantial evidence without the deposition of any witness testifying to the facts set out in the bill. It is obvious that a sworn answer responsive to the bill stands as the deposition of one witness, and, if encountered by one witness testifying in contradiction, and no circumstances appear affecting the case, no preponderance of proof is made out on either side, and the orator must fail

⁸¹ See, *Croarkin v. Hutchinson*, 187 Ill. 633, 58 N. E. 678; *Galbraith v. Galbraith*, 190 Pa. St. 225, 42 Atl. 683; *Slessinger v. Buckingham*, 8 Sawy. (U. S.) 469; *Stephens v. Orman*, 10 Fla. 9; *Morrison v. Durr*, 122 U. S. 518, 7 Sup. Ct. 1215; *Evans v. Evans*, (N. J. Eq.) 59 Atl. 564.

⁸² *Field v. Wilbur*, 49 Vt. 157; *Robinson v. Hardin*, 26 Ga. 344; *White v. Crew*, 16 Ga. 416; *Jones v. Belt*, 2 Gill (Md.) 106; *Kilbourn*

v. Latta, 5 Mackey (D. C.) 304, 60 Am. R. 373; *Jones v. Abraham*, 75 Va. 466; *Parker v. Phetteplace*, 2 Cliff. (U. S.) 70, affirmed in 1 Wall. (U. S.) 684; *Garrett v. Garrett*, 29 Ala. 439; *Gillett v. Robbins*, 12 Wis. 319. Where, in addition to testimony against a responsive answer, there are corroborative circumstances in evidence, a decree for the plaintiff may be sustained. *Gundaker v. Ehrgott*, 209 Pa. St. 284, 58 Atl. 476.

because the burden of proof is upon him. But the answer considered as evidence is to be weighed precisely as it would be if it appeared in a deposition disconnected from the defendant's pleading; and the fact that the defendant is interested in the event of the suit has the same effect in discrediting his story that it does in an ordinary case of law. Again, if the answer is evasive or equivocating, it lessens its force as evidence precisely as such circumstances impair the story of a witness told on the witness stand. In short, the answer, when used as evidence, is subject to the same proper criticism and the same legal infirmities that attach to all evidence in whatsoever form it is introduced in court. All that the orator is bound to do is to meet and overcome the answer by competent proof. This proof may require one or twenty witnesses; it may be made without any."⁸³

§ 3199. Answer as evidence for defendant—Limitations and exceptions.—There are certain limitations or exceptions to the general rule in equity making the answer of the defendant evidence for himself, which will be considered in this and the following sections. It is the prevailing doctrine in the United States that the rule is not applicable to an unsworn answer, no matter whether an answer under oath is required by the bill or not, the rule apparently being otherwise in England.⁸⁴ So, in most jurisdictions, if an answer under oath is expressly waived in the bill an answer that is sworn to cannot be used by the defendant as evidence in his favor any more than an unsworn answer.⁸⁵ It has even been said that if not

⁸³ *Veile v. Blodgett*, 49 Vt. 270, 277; see also, *Deimel v. Brown*, 136 Ill. 586, 27 N. E. 44; *McLane v. Johnson*, 59 Vt. 237, 9 Atl. 837; *Field v. Wilbur*, 49 Vt. 157; *White v. Crew*, 16 Ga. 416.

⁸⁴ *Union Bank v. Geary*, 5 Pet. (U. S.) 99; *Patterson v. Gaines*, 6 How. (U. S.) 550, 586; *Bartlett v. Gale*, 4 Paige (N. Y.) 503; *Willis v. Henderson*, 4 Scamm. (Ill.) 13; *Peck v. Hunter*, 7 Ind. 295; *Tomlinson v. Lindley*, 2 Ind. 569; *Smith v. Phelps*, 32 Iowa 537; *McLard v. Linnville*, 10 Humph. (Tenn.) 163; *Taggart v. Boldin*, 10 Md. 104; Wil-

son v. Towle, 36 N. H. 129; *Willenborg v. Murphy*, 36 Ill. 344; *Goodwin v. Bishop*, 145 Ill. 421, 34 N. E. 47; *Hyer v. Little*, 20 N. J. Eq. 443; *Craft v. Sahlag*, 61 N. J. Eq. 567, 49 Atl. 431; *Story Eq. Pl.*, § 875, et seq.

⁸⁵ *Treadwell v. Lennig*, 50 Fed. 872; *Clay v. Towle*, 78 Me. 86, 2 Atl. 852; *Peter v. Wright*, 6 Ind. 183; *Bickerdike v. Allen*, 157 Ill. 95, 41 N. E. 740, 29 L. R. A. 782; *Morrison v. Hardin*, 81 Miss. 583, 33 So. 80; see also, *Sweet v. Par-ker*, 22 N. J. Eq. 453; *Ayer v. Messer*, 59 N. H. 279; *Miller v. Avery*, 2

called for under oath it is not evidence of the facts therein stated.⁸⁶ But this seems to be a loose or incorrect way of stating the limitations, at least as it exists in most jurisdictions. As said in a recent case by the Supreme Court of the United States: "The bill neither required nor waived an answer under oath, but the defendant answered under oath, traversing all the averments of the bill, upon which the prayer for relief was based. The answer, though not called for under oath, is evidence on behalf of the defendant. For, if a plaintiff in equity is unwilling that the answer should be evidence against him, he must expressly waive the oath of the defendant in his bill. . . . If he fails to do this, the answer must be given under oath and is evidence."⁸⁷ There are also other limitations. In order to enable the defendant to claim the benefit of the general rule, the facts stated in the answer must be responsive to the allegations and interrogatories of the bill, and the answer must be positive and distinct, and not evasive and illusory.⁸⁸ So, where the facts stated or denied in the answer could not possibly be within the personal knowledge of the defendant, as sometimes happens in the case of an executor or heir, or the like or where they are stated or denied only upon information and belief, or by way of inference from facts not particularly stated, the same amount of counter-

Barb. Ch. (N. Y.) 582; Bingham v. Yeomans, 10 Cush. (Mass.) 58; Watts v. Eufaula Nat. Bank, 76 Ala. 474., At least it has no more probative force than an affidavit. United States v. Workingmen's &c. Council, 54 Fed. 994; see and compare, Vanderzer v. McMillan, 28 Ga. 339; Armstrong v. Scott, 3 Greene (Iowa) 433; Jones v. Abraham, 75 Va. 466, where there is no such rule as to waiving an answer under oath.

⁸⁶ See, Mankey v. Willoughby, 21 D. C. (App.) 314; Clay v. Towle, 78 Me. 86, 2 Atl. 852.

⁸⁷ Conly v. Nailor, 118 U. S. 127, 6 Sup. Ct. 1001; see also, Jacobs v. Van Sickle, 61 C. C. A. 598, 127 Fed. 62; Kahn v. Weinlander, 39 Fla. 210, 22 So. 653, 655.

⁸⁸ Barton v. Barton, 75 Ala. 400;

Cole v. Shetterly, 13 Ill. App. 420; Stouffer v. Machen, 16 Ill. 553; Wakeman v. Grover, 4 Paige (N. Y.) 23; Lucas v. Bank of Darien, 4 Stew. (Ala.) 280; Kellogg v. Singer &c. Co., 35 Fla. 99, 17 So. 68; New England Bank v. Lewis, 8 Pick. (Mass.) 113; Phillips v. Richardson, 4 J. J. Marsh. (Ky.) 213; Sallee v. Duncan, 7 T. B. Mon. (Ky.) 382; Cocke v. Trotter, 10 Yerg. (Tenn.) 212; O'Brien v. Elliot, 15 Me. 125; Buck v. Swazey, 35 Me. 41; Smith v. Kincaid, 10 Humph. (Tenn.) 73; Jacks v. Nichols, 1 Seld. (N. Y.) 178; Stevens v. Post, 1 Beas. Eq. (N. J.) 408; Coleman v. Ross, 46 Pa. St. 180, 184; Wells v. Houston, 37 Vt. 245; Velle v. Blodgett, 49 Vt. 270; Roach v. Summers, 20 Wall. (U. S.) 165; Seitz v. Mitchell, 94 U. S. 580.

vailing proof to overcome the answer is not required.⁸⁹ Thus, the answer of a defendant formally denying that which he is not alleged to know, and which from his situation he could not know, has been held not to be conclusive as to require more than one witness on the part of the complainant to establish what is thus denied.⁹⁰ So, where the defendant only answers on information and belief, a single witness on the part of the complainant may be sufficient to establish the fact;⁹¹ and the same is held where the answer contains no positive denial of material facts distinctly and positively alleged and charged in the bill.⁹² And so, a denial in an answer

⁸⁹ *Combs v. Boswell*, 1 Dana (Ky.) 474; *Lawrence v. Lawrence*, 4 Bibb. (Ky.) 357; *Harlan v. Wingate*, 2 J. J. Marsh. (Ky.) 138; *Carneal's Heirs v. Day*, Litt. Sel. Cas. (Ky.) 492; *Knickerbacker v. Harris*, 1 Paige (N. Y.) 209; *Drury v. Conner*, 6 H. & J. (Md.) 288; *Pennington v. Gittings*, 2 Gill & J. (Md.) 208; *Fryrear v. Lawrence*, 10 Ill. 325; *Clarke v. Van Riemdyk*, 9 Cranch. (U. S.) 153; *Paulding v. Watson*, 21 Ala. 279; *Copeland v. Crane*, 9 Pick. (Mass.) 73; *Snell v. Fewell*, 64 Miss. 655, 1 So. 908; *Toulme v. Clark*, 64 Miss. 471, 1 So. 624; *Berry v. Sawyer*, 19 Fed. 286; *Holladay Case, The*, 27 Fed. 830; *Miller v. District of Columbia*, 5 Mackey (D. C.) 291; *Blair v. Silver Peak Mines*, 84 Fed. 737, 93 Fed. 332; *Savings &c. Soc. v. Davidson*, 38 C. C. A. 365, 97 Fed. 696; but see, *McGehee v. White*, 31 Miss. 41.

⁹⁰ *Lawrence v. Lawrence*, 21 N. J. Eq. 317; *Garrow v. Carpenter*, 1 Port. (Ala.) 359; *Reynolds v. Pharr*, 9 Ala. 560; *Combs v. Tarlton*, 2 Dana (Ky.) 464; *Lawrence v. Lawrence*, 4 Bibb. (Ky.) 357; *Watson v. Palmer*, 5 Ark. 501, 506; *Biscoe v. Coulter*, 18 Ark. 423; *Loomis v. Fay*, 24 Vt. 240; *Clarke v. Van Riemdyk*, 9 Cranch. (U. S.) 153. These and similar answers generally have little, if any, effect except to put the case at

issue and require the complainant to prove his case. See, *Young v. Hopkins*, 6 T. B. Mon. (Ky.) 18; *Harlan v. Wingate*, 2 J. J. Marsh. (Ky.) 138; *Brown v. Pierce*, 7 Wall. (U. S.) 205, 211, 212; *Drury v. Conner*, 6 H. & J. (Md.) 288; *Paulding v. Watson*, 21 Ala. 279; *Williamson v. McConnell*, 4 Dana (Ky.) 454.

⁹¹ *Deimel v. Brown*, 136 Ill. 586, 27 N. E. 44; *Knickerbacker v. Harris*, 1 Paige (N. Y.) 210; *Town v. Needham*, 3 Paige (N. Y.) 546; *Hanchett v. Blair*, 41 C. C. A. 76, 100 Fed. 817; *Allen v. O'Donald*, 28 Fed. 17; *Watson v. Palmer*, 5 Ark. 501; *McKisick v. Martin*, 12 Heisk. (Tenn.) 311; *Wilkins v. May*, 3 Head (Tenn.) 173; *Atlantic &c. Ins. Co. v. Wilson*, 5 R. I. 479; *McGuffie v. Planters' Bank*, Freem. (Miss.) 383; *Toulme v. Clark*, 64 Miss. 471, 1 So. 624; *Loomis v. Fay*, 24 Vt. 240; *Copeland v. Crane*, 9 Pick. (Mass.) 73; *New Brunswick &c. Co. v. Eden*, 62 N. J. Eq. 542, 50 Atl. 606; *Gantt v. Cox &c. Co.*, 199 Pa. St. 208, 48 Atl. 992.

⁹² *Benson v. Woolverton*, 15 N. J. Eq. 158; *Rhea v. Allison*, 3 Head (Tenn.) 176, 179; *Farnam v. Brooks*, 9 Pick. (Mass.) 212; *Morse v. Hill*, 136 Mass. 60; *Le Neve v. Le Neve*, 1 Ves. 64, 66; *Barraque v. Siter*, 9 Ark. 545; *Toulme v. Clarke*, 64 Miss. 471, 1 So. 624.

is of no avail as against a matter conclusively presumed by a rule of law,⁹³ and it must be to some fact rather than a mere inference of law.⁹⁴

§ 3200. Answer as evidence for defendant—Rule where complainant does not reply—Hearing on bill and answer.—Several of the limitations or exceptions considered in the above section are only applicable where the complainant has put in a replication, and taken issue upon the allegations of the answer. Where he does not do so, but sets the case down for hearing on bill and answer, he so far waives his rights, and the answer so far as well pleaded is to be taken as true whether responsive or not.⁹⁵ He, in effect, submits the cause on the contention that he is entitled to a decree as prayed for in his bill, notwithstanding the denials and matters stated in the answer, as, for instance, upon the admission also contained in the answer.

§ 3201. Responsive answers—Illustrative cases.—As already stated where the hearing is upon the bill, answer and replication, in order to have the peculiar effect given to an answer in equity the answer must be responsive. Thus, in a recent case, it is held that an answer in equity, although under oath, is not evidence for defendant, in so far as it sets up new facts by way of avoidance of the matters averred in the bill, and that such allegations must be proved by

⁹³ *Smallwood v. Lewin*, 15 N. J. Eq. 60; *Adams v. Adams*, 21 Wall. (U. S.) 185; *Commercial &c. Ins. Co. v. Union Mut. Ins. Co.*, 19 How. (U. S.) 318, 319.

⁹⁴ *Gainer v. Russ*, 20 Fla. 157; *Robinson v. Cathcart*, 2 Cranch. (U. S.) 590.

⁹⁵ *Reese v. Barker*, 85 Ala. 474, 5 So. 305; *Cherry v. Belcher*, 5 Stew. & P. (Ala.) 133; *Peirce v. West*, 1 Pet. (U. S.) 351; *Dale v. McEvers*, 2 Cow. (N. Y.) 118; *Jones v. Mason*, 5 Rand. (Va.) 577; *Bierne v. Ray*, 37 W. Va. 571, 16 S. E. 804; *Scott v. Clarkson*, 1 Bibb (Ky.) 277; *Moore v. Hylton*, 1 Dev. Eq. (N. Car.) 429; *Huyck v. Bailey*, 100 Mich. 223, 58 N. W. 1002; *Carman v. Watson*, 1 How. (Miss.) 333; *Lanning v. Smith*, 1 Pars. Eq. (Pa.) 13, 17; *Read v. Rey-*

nolds, (Md.) 59 Atl. 669; *Ware v. Richardson*, 3 Md. 505; *Mason v. Martin*, 4 Md. 124; *Barton v. Baltimore &c. Alliance*, 85 Md. 14, 36 Atl. 658; *Perkins v. Nichols*, 11 Allen (Mass.) 542; *Farrell v. McKee*, 36 Ill. 225; *Roach v. Glos*, 181 Ill. 440, 54 N. E. 1022; *Eversole v. Maull*, 50 Md. 95; *Philadelphia's Appeal*, 78 Pa. St. 33; *United States v. Scott*, 3 Woods (U. S.) 334; *McCully v. Peel*, 42 N. J. Eq. 493; *Bowers v. McGavock*, (Tenn.) 85 S. W. 893; *Parker v. Concord*, 39 Fed. 718; *Lake Erie &c. R. Co. v. Indianapolis &c. Bank*, 65 Fed. 690; but see, *Van Dyke v. Van Dyke*, 26 N. J. Eq. 180; *Taunton v. Taylor*, 116 Mass. 254. The rule is changed by statute in some states.

other evidence.⁹⁶ This is the general rule in regard to new matter pleaded as a defense in avoidance.⁹⁷ But, although affirmative in form and in a sense in avoidance it may, perhaps, be responsive to the bill, and there are some cases in which such an answer has been held to be evidence for the defendant.⁹⁸ In one case the complainant in his bill against a corporation and its stockholders seeking to enforce his rights as a stockholder, alleged that he was an original subscriber for stock, that the defendants refused to give him a certificate and confederated to deprive him of his rights as a stockholder. The answer admitted the act of subscribing, but alleged that it was accompanied by an agreement that it was wholly for the use of the defendant stockholders, and the court held that this was not subsequent matter in avoidance, but a material portion of the facts in the case, and responsive to the bill.⁹⁹ The same court has also held an answer responsive to a bill by a wife against her husband to recover a sum of money alleged to have been paid by her in building and furnishing their house, and for which the defendant had given her no security, where such answer alleged that the money had been given him by the complainant, and that there was no agreement, contract or understanding that he was to repay or in any way secure the money.¹⁰⁰ Where a bill to set aside a decree and recover property alleged that the decree was obtained by fraud and collusion, and the pleas and answers under oath denied the fraud and collusion charged, and averred a purchase of the property in good faith for valuable consideration, such averments were held responsive

⁹⁶ *Pennsylvania Co. v. Cole*, 132 Fed. 668.

⁹⁷ *Goodloe v. Dean*, 81 Ala. 479, 8 So. 197; *Craft v. Russell*, 67 Ala. 9; *Robinson v. Jefferson*, 1 Del. Ch. 244; *Dexter v. Gordon*, 11 D. C. (App.) 60; *Orman v. Barnard*, 5 Fla. 528; *Walton v. Walton*, 70 Ill. 142; *Peck v. Hunter*, 7 Ind. 295; *White v. Hampton*, 10 Iowa 238; *Taylor v. Morton*, 5 J. J. Marsh. (Ky.) 65; *O'Brien v. Elliott*, 15 Me. 125, 32 Am. Dec. 137; *Smoot v. Rea*, 19 Md. 398; *Dyer v. Williams*, 62 Miss. 302; *Ingersoll v. Stiger*, 46 N. J. Eq. 511, 19 Atl. 842; *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62;

Cloud v. Calhoun, 10 Rich. Eq. (S. Car.) 358; *Lewis v. Mason*, 84 Va. 731, 10 S. E. 529; *Humes v. Scruggs*, 94 U. S. 22; *Clements v. Moore*, 6 Wall. (U. S.) 299; *Bates Fed. Eq. Proc.*, § 324; *Mitford & Tyler Pl. & Pr. in Eq.* 461.

⁹⁸ See, *Stillwell v. Badgett*, 22 Ark. 164; *Smith v. Atwood*, 14 Ga. 402; *Bellows v. Stone*, 18 N. H. 465; but compare, *Beech v. Haynes*, 1 Tenn. Ch. 569.

⁹⁹ *Rowley's Appeal*, 115 Pa. St. 150, 9 Atl. 329.

¹⁰⁰ *Gleghorne v. Gleghorne*, 118 Pa. St. 383, 11 Atl. 797; see also, *Reid v. McCallister*, 49 Fed. 16.

to the allegations of the bill.¹⁰¹ Again, where a bill filed to redeem stock alleged that it had been pledged for five hundred dollars, and the answer stated that it was pledged for eight hundred dollars in addition thereto, this was held to be responsive.¹⁰² So, where a bill was filed to subject stocks of an estate to the payment of a debt for which they were held as collateral security, and the answer by one of the executors admitted that the money was borrowed from the plaintiff and the security given as alleged in the bill, but averred that the loan was made to the business firm of which the executor was a member and that the stock pledged by the executor as security then belonged to the estate and that these facts were known to the plaintiff, it was held that the answer was responsive to the bill.¹⁰³ And in a number of other cases where the admission and avoidance were in regard to one single fact or transaction and were necessary to be taken together in order to understand it and give it the true effect, the answer has been held evidence of both.¹⁰⁴ So, in a recent case it is held that unless a bill expressly waives an answer under oath, it must be so made, and, when responsive to the bill, it is evidence for the defendant, which can only be overcome by witnesses, or its equivalent; and the allegations of a bill charging fraud cannot be considered proved where they are specifically denied by answers under oath, and the only testimony introduced by complainant is that of the defendants, which supports the averments of the answers.¹⁰⁵ Where judgment creditors sought to set aside an execution sale on the ground of fraud in the judgment, and the bill called for an answer under oath, an answer denying every allegation of fraud was held responsive.¹⁰⁶

§ 3202. Answers not responsive.—In a recent case an answer to a bill seeking to have a tax claim canceled, was held so evasive and irresponsible that it did not even put the plaintiff to proof of the

¹⁰¹ *Beals v. Illinois &c. R. Co.*, 133 U. S. 290, 10 Sup. Ct. 314.

¹⁰² *Dunham v. Jackson*, 6 Wend. (N. Y.) 22; reviewed in, *Schwarz v. Wendell*, 1 Walk. (Mich.) 267.

¹⁰³ *Bell v. Farmers' &c. Bank*, 131 Pa. St. 318, 18 Atl. 1079.

¹⁰⁴ *Cooper v. Tappan*, 9 Wis. 333; *Pickering v. Day*, 2 Del. Ch. 333; *Day v. Jones*, 40 Fla. 443, 25 So. 275;

Merritt v. Brown, 19 N. J. Eq. 286; *Appeal of Rowley*, 115 Pa. St. 150, 9 Atl. 329; see also, *Maxwell v. Jacksonville Loan &c. Co.*, (Fla.) 34 So. 255.

¹⁰⁵ *Jacobs v. Van Sickle*, 61 C. C. A. 598, 127 Fed. 62, affirming 123 Fed. 340.

¹⁰⁶ *Morrison v. Durr*, 122 U. S. 518, 7 Sup Ct. 1215.

allegations of his bill.¹⁰⁷ In another case, which was a suit between partners for an accounting, it was held that an allegation of the answer that a third party was a joint partner with the complainant and defendant and a necessary party to the suit, was not responsive, and that it could not be assumed to be true at the hearing upon exceptions to the answer.¹⁰⁸ So, an averment in an answer to a bill for specific performance that the contract was conditional on its being approved by the defendant's wife, no such condition being in the writing sued on, was held not to be responsive to the bill and capable of being proved only by evidence independent of the answer.¹⁰⁹ In a suit to restrain the collection of a judgment on the ground that it was recovered on a prior judgment on a note which the judgment creditor held as collateral security, where the bill also alleged that the debt for which the note was collateral had been paid and discharged, an allegation in the answer denying defendant's knowledge of any defense to the collateral note was held not responsive to the bill.¹¹⁰ In a suit by a creditor for an account of a deceased husband's estate, and for payment of plaintiff's debt, the wife, who was also administratrix, answered that a certain bond executed by her father to the husband had been assigned to her by a post-nuptial settlement as her sole and separate estate in pursuance of an agreement made at the time of the execution of the bond, but it was held that this was not responsive to any allegation in the bill.¹¹¹ So, in a suit to foreclose a mortgage, the defendant answered under oath, admitting the execution of the mortgage, but alleging that it was given in lieu of another mortgage that the complainant agreed to cancel and return to the defendant, which he failed to do, and praying that he be compelled to so cancel and return it, but it was held that such alleged agreement was new matter and not responsive to the bill.¹¹² An answer of payment has also been held affirmative new matter and not responsive in several cases,¹¹³ but such an answer has been held responsive in other cases.¹¹⁴

¹⁰⁷ *Applewhite v. Foxworth*, 79 Miss. 773, 31 So. 533.

¹⁰⁸ *Brewer v. Norcross*, 17 N. J. Eq. 219.

¹⁰⁹ *Ives v. Hazard*, 4 R. I. 14, 67 Am. Dec. 500.

¹¹⁰ *Harding v. Hawkins*, 141 Ill. 572, 31 N. E. 307, 33 Am. St. 347.

¹¹¹ *Lewis v. Mason*, 84 Va. 731, 10 S. E. 529.

¹¹² *Ingersoll v. Stiger*, 48 N. J. Eq. 511, 19 Atl. 842.

¹¹³ *Ison v. Ison*, 5 Rich. Eq. (S. Car.) 15; *Adams v. Adams*, 22 Vt. 50; *Hickman v. Painter*, 11 W. Va. 386.

¹¹⁴ *King v. Payan*, 18 Ark. 583; *Britt v. Bradshaw*, 18 Ark. 530; *Grafton Bank v. Doe*, 19 Vt. 463; *Stevens v. Post*, 12 N. J. Eq. 408;

§ 3203. Test of responsiveness.—There seems to be no accurate and invariable test for determining when an answer is responsive within the meaning of the rule. Each case necessarily depends very largely upon its particular features, and, as will be seen by comparing the authorities referred to in the last two preceding sections, the courts have in some instances taken different views in different cases that cannot well be distinguished in principle. A test that has been suggested is furnished by ascertaining whether the questions answered would be proper to propound to a witness; whether they would be relevant and such as the witness would be bound to answer, and the answers competent testimony.¹¹⁵ It has also been suggested that if the whole subject-matter of an allegation in the answer might have been omitted, such allegation is not responsive; but if its omission would furnish ground of exception to the answer, such allegation is responsive.¹¹⁶ As already shown, the form of the allegation does not furnish a satisfactory test and is not always conclusive.

§ 3204. Answer false in part—Incredible answer.—The maxim *falsus in uno falsus in omnibus* has sometimes been applied to answers in equity, and it has often been stated in general terms that when an answer is disproved in a material point it loses its weight as evidence.¹¹⁷ Thus, it has been said in substance that where the answer is contradicted in any one or more important particulars by two witnesses or one witness and corroborating circumstances it is deprived in all respects of the weight ordinarily given answers in courts of equity, for “being falsified in one thing, no confidence can be placed in it as to the others according to the maxim *falsus in uno, falsus in omnibus*.”¹¹⁸ But that maxim, as ordinarily applied, does not absolutely require, but merely authorizes, the discrediting of the other evidence or testimony of the same person, and the correctness of the alleged rule thus broadly stated, under all circumstances and without any qualification, admits of some question.¹¹⁹

McCaw v. Blewit, 2 McCord Eq. (S. Car.) 90.

¹¹⁵ *Dunham v. Gates*, 1 Hoff. Ch. (N. Y.) 185, 3 Greenleaf Ev., § 285.

¹¹⁶ *Bellows v. Stone*, 18 N. H. 465.

¹¹⁷ *Prout v. Roberts*, 32 Ala. 427;

Gunn v. Brantley, 21 Ala. 633;

Pharis v. Leachman, 20 Ala. 662;

Gamble v. Johnson, 9 Mo. 605;

Roundtree v. Gordon, 8 Mo. 19; *Forsyth v. Clark*, 3 Wend. (N. Y.) 637;

Countz v. Geiger, 1 Call (Va.) 190;

Fay v. Oatley, 6 Wis. 42.

¹¹⁸ *Roundtree v. Gordon*, 8 Mo. 19, 25.

¹¹⁹ See, *Fant v. Miller*, 17 Gratt. (Va.) 187.

The rule in regard to the effect of responsive answers, however, has been said to apply only to fair answers, not to those which upon their face are incredible.¹²⁰ And an answer may contain within itself such matters as will deprive it of all efficacy as evidence.¹²¹

§ 3205. Questioning competency and impeaching defendant who answers under oath.—It is held that if a sworn answer is called for in the bill the plaintiff thereby makes the defendant a competent witness as to matters in the answer responsive to the bill, or waives objections thereto, and that the answer is competent as to such matters even though the defendant would not be a competent witness.¹²² So, it is held that the plaintiff who has called for such an answer is not entitled to impeach the defendant by proof of bad character for the purpose of weakening the effect of the answer.¹²³ But the answer may be weakened either by its own contradictions, or intrinsic defects¹²⁴ or by proper extrinsic evidence, including the testimony of the defendant on the hearing.¹²⁵

§ 3206. Answer of co-defendant.—It has already been shown that admissions in the answer of a defendant may be used against himself. But it is the general rule that the answer of one defendant is not evidence against another defendant,¹²⁶ and this has been held

¹²⁰ *Stevens v. Post*, 12 N. J. Eq. 408.

¹²¹ *Commercial Bank v. Reckless*, 5 N. J. Eq. 650; *Brown v. Bulkley*, 14 N. J. Eq. 294; *Dunham v. Gates*, 1 Hoff. Ch. (N. Y.) 185; *Morris v. White*, 36 N. J. Eq. 324, 329; *Hoboken Sav. Bank v. Beckman*, 33 N. J. Eq. 53; see also, *Wheat v. Moss*, 16 Ark. 243; *Russell v. Russell*, 4 Dana (Ky.) 40; *Ellis v. Woods*, 9 Rich. Eq. (S. Car.) 19; *Yost v. Hudiburg*, 2 Lea (Tenn.) 627.

¹²² *Saffold v. Horne*, 71 Miss. 762, 15 So. 639; see also, *Blaisdell v. Bowers*, 40 Vt. 126.

¹²³ *Murray v. Johnson*, 1 Head (Tenn.) 353; *Brown v. Bulkley*, 14 N. J. Eq. 294; *Butler v. Catling*, 1 Root (Conn.) 310; *Chambers v. Warren*, 13 Ill. 318; *Clark v. Bailey*,

2 Strob. Eq. (S. Car.) 143; but see, *Miller v. Tollison*, Harper Eq. (S. Car.) 119.

¹²⁴ *Baker v. Williamson*, 4 Pa. St. 456; *Crawford v. Kirksey*, 50 Ala. 590; *Dunham v. Gates*, 1 Hoff. Ch. (N. Y.) 185; *Stevens v. Post*, 12 N. J. Eq. 408; *Harris v. Collins*, 75 Ga. 97; *Jones v. Belt*, 2 Gill (Md.) 106; *Moore v. Hylton*, 1 Dev. Eq. (N. Car.) 429; *Brown v. Brown*, 10 Yerg. (Tenn.) 84.

¹²⁵ *Roberts v. Miles*, 12 Mich. 297; *Spencer's Appeal*, 80 Pa. St. 317. But some cases hold that the answer is conclusive where it is called for by a pure bill of discovery. *Thompson v. Clark*, 81 Va. 422; *Jackson v. Hart*, 11 Wend. (N. Y.) 343.

¹²⁶ *Danner Land &c. Co. v. Stonewall Ins. Co.*, 77 Ala. 184; *Whiting*

to be especially true where the defendant whose answer it is sought to use against a co-defendant is substantially a plaintiff.¹²⁷ It has also been held that it does not necessarily make any difference that one defendant is the agent of the other.¹²⁸ But the answer of one defendant may be used as evidence against other defendants claiming through him,¹²⁹ or where the defendants are either legally or fraudulently combined so as to create a unity of interest between them,¹³⁰ or, in general, where there is a privity of estate or interest. So it has been held that where one partner, in a joint and several answer by both, makes admissions as to his own acts in regard to the business of the firm, and the other defendant states his belief that such admissions are true, a decree may be made against both on such admissions.¹³¹ So, generally where one refers to and adopts the answer of the other.¹³² It was also held in an interpleader suit where it appeared by the answer of each defendant that he claimed the fund in dispute from the complainant, that no other evidence of

v. Beebe, 12 Ark. 421; *Blakeney v. Ferguson*, 14 Ark. 640; *Stackpole v. Hancock*, 40 Fla. 362, 24 So. 914, 45 L. R. A. 814; *Christie v. Bishop*, 1 Barb. Ch. (N. Y.) 105; *Salmon v. Smith*, 58 Miss. 399; *Hanover Nat. Bank v. Klein*, 64 Miss. 141, 8 So. 208; *Webb v. Pell*, 3 Paige (N. Y.) 368; *Leeds v. Marine Ins. Co.*, 2 Wheat. (U. S.) 380; *Clarke v. Van Riemsdyk*, 9 Cranch (U. S.) 153; *McKim v. Thompson*, 1 Bland (Md.) 150, 160; *Kennedy v. Davenport*, 13 B. Mon. (Ky.) 167; *McElroy v. Ludlum*, 32 N. J. Eq. 828; *Savage v. Carroll*, 1 Ball & B. 548, 553; *Reese v. Reese*, 41 Md. 554; *Stewart v. Stone*, 3 Gill & J. (Md.) 514; *Hayward v. Carroll*, 4 H. & J. (Md.) 518, 520; *Calwell v. Boyer*, 8 Gill & J. (Md.) 136; *Harwood v. Jones*, 10 Gill & J. (Md.) 404, 32 Am. Dec. 180; *Jones v. Hardesty*, 10 Gill & J. (Md.) 404; *Glenn v. Grover*, 3 Md. 212; *Wrottesley v. Blendish*, 3 P. Wms. 235; *Leigh v. Ward*, 2 Vent. 72.

¹²⁷ *Field v. Holland*, 6 Cranch (U. S.) 8.

¹²⁸ *Leeds v. Marine Ins. Co.*, 2

Wheat. (U. S.) 380; see also, *Moore v. Hubbard*, 4 Ala. 187; *Chapin v. Coleman*, 11 Pick. (Mass.) 331; but compare, *Rust v. Mansfield*, 25 Ill. 336; *Mobley v. Dubuque &c. Co.*, 11 Iowa 71; *Clarke v. Van Riemsdyk*, 9 Cranch (U. S.) 153.

¹²⁹ *Osborn v. United States Bank*, 9 Wheat. (U. S.) 738 *Field v. Holland*, 6 Cranch. (U. S.) 8; *Jones v. Hardesty*, 10 Gill & J. (Md.) 404, 415; *Emerson v. Atwater*, 12 Mich. 314; *Fitch v. Stamps*, 6 How. (Miss.) 487; but see, *Winn v. Albert*, 2 Md. Ch. 169.

¹³⁰ *Christie v. Bishop*, 1 Barb. Ch. (N. Y.) 105; *Lockman v. Miller*, 25 Miss. 786, 22 So. 822; *Hickson v. Bryan*, 75 Ga. 392; *Townsend v. McIntosh*, 14 Ind. 57; *Pensoneau v. Pulliam*, 47 Ill. 58.

¹³¹ *Judd v. Seaver*, 8 Paige (N. Y.) 548; *Bevans v. Sullivan*, 4 Gill (Md.) 383, 391.

¹³² *Blakeney v. Ferguson*, 14 Ark. 640; *Chase v. Manhardt*, 1 Bland (Md.) 333; *Dunham v. Gates*, 3 Barb. Ch. (N. Y.) 196; *Anonymous*, 1 P. Wms. 301.

such fact need be produced.¹³³ And it has been stated generally that where the admissions of one defendant would be competent against the other, the answer of the former containing such admissions is competent.¹³⁴ So, the sworn answer of one defendant, responsive to the bill, has been held to be evidence in favor of other defendants against the plaintiff.¹³⁵

§ 3207. Answers not evidence against infants.—The answers of infants by their guardians are pleadings merely, and not evidence, although responsive to the bill and sworn to by their guardian ad litem or next friend.¹³⁶ The allegations of the bill should be proved by other means before a decree should be entered against their interests.¹³⁷ It has even been said that the admission in a deceased heir's answer of the will of the testator has been held not to be binding upon the infant heir who has succeeded him,¹³⁸ and there are many cases in which it has been held that the answers of adult co-defendants cannot be used against an infant.¹³⁹

§ 3208. Plea as evidence.—At the hearing upon a plea, replication, and proofs, no fact is in issue except the matters pleaded by or in support of the plea, and a plea which avoids the discovery prayed for is no evidence in the defendant's favor, even when it is under oath and negatives a material averment in the bill.¹⁴⁰ Thus, where a plea is filed and there is no answer, the averments of the

¹³³ *Balchen v. Crawford*, 1 Sandf. Ch. (N. Y.) 380.

¹³⁴ See, *Martin v. Dryden*, 6 Ill. 187; *Christie v. Bishop*, 1 Barb. Ch. (N. Y.) 105; *Gilmore v. Patterson*, 36 Me. 544; *Dick v. Hamilton*, Deady (U. S.) 322, 7 Fed. Cas. No. 3890; *Porter v. Rutland Bank*, 19 Vt. 410.

¹³⁵ *Pleasanton v. Raughley*, 3 Del. Ch. 124; *Miles v. Miles*, 32 N. H. 147, 64 Am. Dec. 362; *Mills v. Gore*, 20 Pick. (Mass.) 28; *Carithers v. Jarrell*, 20 Ga. 842; *Glenn v. Baker*, 1 Md. Ch. 73; *Salmon v. Smith*, 58 Miss. 399; but see, *Frank v. Lillienfeld*, 33 Gratt. (Va.) 377; *Larkins's Appeal*, 38 Pa. St. 457.

¹³⁶ *Bulkley v. Van Wyck*, 5 Paige (N. Y.) 536; *Wright v. Miller*, 1

Sandf. Ch. (N. Y.) 103; *James v. James*, 4 Paige (N. Y.) 114.

¹³⁷ *Harris v. Harris*, 6 Gill & J. (Md.) 111; *Stephenson v. Stephenson*, 6 Paige (N. Y.) 353.

¹³⁸ *Story Eq. Pl.* (10th ed.), § 871; see also, *Tompkins v. Tompkins*, 18 N. J. Eq. 303; but compare, *Robertson v. Parks*, 3 Md. Ch. 65; *Lock v. Fouts*, 4 Sim. 132.

¹³⁹ See, *Sawyers v. Swayers*, 106 Tenn. 597, 61 S. W. 1022; *Shirley v. Shields*, 8 Blackf. (Ind.) 273; *Campbell v. Campbell*, 1 Ind. 220.

¹⁴⁰ *Farley v. Kittson*, 120 U. S. 303, 7 Sup. Ct. 534; see also, *Roache v. Morgell*, 2 Schoales & L. 721, 725, 727; *Stead v. Course*, 4 Cranch (U. S.) 403, 413; *Heartt v. Corning*, 3

bill will control conflicting averments in the plea even though the latter is verified.¹⁴¹ But it has been held that a plea may be used against the party pleading where it contains admissions against his interest, even on the hearing of another plea or answer in the cause.¹⁴²

§ 3209. Cross-bill and answer.—A cross-bill which is taken as confessed may be used as evidence against the complainant in the original case on the hearing to the same effect as if he had admitted the same facts in the answer.¹⁴³ It has been held, however, that where the defendant files a cross-bill setting out new matter, and does not call on complainant to answer as to the same, the allegations will not be taken as true and the defendant will be required to prove them.¹⁴⁴ So, it has been said that when the defendant in the original bill takes on himself the affirmative by a cross-bill, and submits his rights to the conscience of those originally complaining, he must abide by the response of the complainants, unless by more than equal evidence they disprove the same.¹⁴⁵ And it has been held that a complainant cannot use his own answer to a cross-bill as evidence unless the defendant first produces it in evidence.¹⁴⁶ In a recent case where the issues raised by a bill and those raised by a cross-bill were entirely different, and the evidence of a witness given on the prior trial of the issue raised by the cross-bill was not relevant to the issue raised by the bill it was held proper to refuse to permit such evidence to be read on the trial of the issue raised by the bill.¹⁴⁷

§ 3210. Witnesses.—The fourth source of evidence in equity, according to Professor Greenleaf, is the testimony of witnesses. Little is required to be said upon this subject, as the rules of competency are in general the same in equity as at law, and, under modern statutes, interest no longer renders a witness incompetent in ordinary cases. But it may be noted, in passing, that the courts of equity

Paige (N. Y.) 566; Rhode Island v. 137; White v. Buloid, 2 Paige (N. Massachusetts, 14 Pet. (U. S.) 210; Y.) 164.

Hughes v. Blake, 6 Wheat. (U. S.) 453; Gernon v. Boccaline, 2 Wash. 144 Hartfield v. Brown, 8 Ark. 283.

(U. S.) 199, 10 Fed. Cas. No. 5366. 145 16 Cyc. 402, citing, Hutton v. Moore, 26 Ark. 382; Pugh v. Pugh, 9 Ind. 132.

¹⁴¹ Mutual Life Ins. Co. v. Blair, 130 Fed. 971.

¹⁴⁶ Kidder v. Barr, 35 N. H. 235.

¹⁴² McNair v. Ragland, 16 N. Car. 533.

¹⁴⁷ Beamer v. Morrison, 210 Ill. 443. 71 N. E. 402.

¹⁴³ Griswold v. Simmons, 50 Miss.

were somewhat more liberal than the courts of law in examining parties and interested persons in some cases,¹⁴⁸ and the examination of a defendant by the plaintiff, as a witness, usually operated as an equitable release as to the matters covered by the examination.¹⁴⁹ So, under the old chancery practice, the testimony of witnesses was usually taken by deposition or the like and oral evidence was seldom received at the hearing. But the modern tendency is to receive oral testimony in many cases as well as depositions. The subject of depositions has been treated in another volume,¹⁵⁰ and the mode of taking testimony in the courts of equity, especially under the acts of congress and United States equity rules, has already been sufficiently considered in other sections in this chapter.

§ 3211. What must be proved—Burden.—"It may be laid down as an indisputable proposition," says Mr. Daniell, "that whatever is necessary to support the case of the plaintiff, so as to entitle him to a decree against the defendant, or of a defendant to support his own case against that of the plaintiff, must be proved; unless it is admitted by the other party."¹⁵¹ A material averment in the bill neither admitted nor denied by the answer must be supported by proof.¹⁵² When a replication is filed to an answer, it thereby puts in issue all the matters alleged in the bill and not admitted by the answer, as well as those matters contained in the answer which are not responsive to the bill.¹⁵³ But, where an answer under oath is waived, or it is not under oath or is not responsive, a preponderance of the

¹⁴⁸ 3 Greenleaf Ev., § 313; *Man v. Ward*, 2 Atk. 228, 229.

¹⁴⁹ 3 Greenleaf Ev., § 316; *Weymouth v. Boyer*, 1 Ves. Jr. 417; *Nightingale v. Dodd*, Ambl. 583; *Lewis v. Owen*, 1 Ired. Eq. (N. Car.) 290, 293; *Palmer v. Van Doren*, 2 Edw. Ch. (N. Y.) 192.

¹⁵⁰ See, Vol. II., Chap. 54.

¹⁵¹ 1 Daniell Ch. Pr. (6th ed.) 836; see also, *Thompson v. Thompson*, 1 Yerg. (Tenn.) 97; *Peck v. Hunter*, 7 Ind. 295; *Campbell v. Brackenridge*, 8 Blackf. (Ind.) 471; *Johnson v. McGrew*, 11 Iowa 151, 77 Am. Dec. 137; *Gilbert v. Mosler*, 11 Iowa 498; *Pusey v. Wright*, 31 Pa. St. 387; *Nelson v. Pinegar*, 30 Ill. 473.

¹⁵² *Glos v. Cratty*, 196 Ill. 193, 63 N. E. 690, and other Illinois cases there cited; *Milligan v. Wissman*, (Tenn. Ch. App.) 42 S. W. 811; *Bank v. Jefferson*, 92 Tenn. 537, 22 S. W. 211; *Crowe v. Wilson*, 65 Md. 479, 5 Atl. 427, 57 Am. R. 343; *McArthur v. Phoebus*, 2 Ohio 415; *Morris v. Morris*, 5 Mich. 171; *Moffat v. McDowall*, 1 McCord Eq. (S. Car.) 434; *Lovell v. Johnson*, 82 Fed. 206. ¹⁵³ *Pinney v. Pinney*, (Fla.) 35 So. 95; *Stackpole v. Hancock*, 40 Fla. 362, 24 So. 914, 45 L. R. A. 814; 18 Ency. of Pl. & Pr. 683; *Humes v. Scruggs*, 94 U. S. 22, 24 L. Ed. 51; *Smith v. St. Louis &c. Ins. Co.*, 2 Tenn. Ch. 599.

evidence to sustain the material allegations of the bill is usually sufficient.¹⁵⁴ A replication to an answer puts in issue every averment therein not responsive to the bill and requires the defendant to produce evidence to establish his defense set up in such answer by way of avoidance.¹⁵⁵ But a replication to a plea usually puts in issue only the truth of the plea, which the defendant must produce evidence to establish,¹⁵⁶ and the evidence in such case is confined to that issue.¹⁵⁷

¹⁵⁴ *Parker v. Safford*, (Fla.) 37 So. 567; see also, *Reynolds v. Pharr*, 9 Ala. 560.

¹⁵⁵ *Orman v. Barnard*, 5 Fla. 528; *Bradley v. Webb*, 53 Me. 462; *Peaks v. McAvey*, (Me.) 7 Atl. 270; *Craft v. Russell*, 67 Ala. 9; *Lake Shore &c. R. Co. v. McMillan*, 84 Ill. 208; *Peck v. Hunter*, 7 Ind. 295; *Todd v. Sterrett*, 6 J. J. Marsh. (Ky.) 425; *Dyer v. Williams*, 62 Miss. 302; *Wilkinson v. Bauerle*, 41 N. J. Eq. 635, 7 Atl. 514; *Jones v. Jones*, 1 Ired. Eq. (N. Car.) 332; *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62; *Simson v. Hart*, 14 Johns. (N. Y.) 63; *Barr v. Haseldon*, 10 Rich. Eq. (S. Car.) 53; *Deaderick v. Watkins*, 8 Humph. (Tenn.) 520; *Garlick v. McArthur*, 6 Wis. 450; *Humes v. Scruggs*, 94 U. S. 22; *Clements v. Moore*, 6 Wall. (U. S.) 299; see also, *O'Hare v. Downing*, 130 Mass. 16; *Leach v. Fobes*, 11 Gray (Mass.) 506, 71 Am. Dec. 732; *Hart v. Carpenter*, 36 Mich. 402.

¹⁵⁶ *Miller v. United States &c. Co.*, 61 N. J. Eq. 110, 47 Atl. 509; *Stead v. Course*, 4 Cranch (U. S.) 403.

¹⁵⁷ *Little v. Stephens*, 82 Mich. 596, 47 N. W. 22; *Fish v. Miller*, 5 Paige (N. Y.) 26. Upon the general subject under consideration it is said in *Ocala Foundry &c. Works v. Lester*, (Fla.) 38 So. 56, 62: "The general rule is that when a replication has been filed to a plea it is incumbent upon the defendant to prove the

facts which the plea suggests. 1 *Daniell Ch. Pl. & Pr.* (6th Am. Ed.) 698; *Dows v. McMichael*, 6 Paige (N. Y.) 139; *Farley v. Kittson*, 120 U. S. 303, 7 Sup. Ct. 534, 30 L. Ed. 684; *Story Eq. Pl.* (10th Ed.), § 697; *Fletcher Pl. & Pr.*, § 279; 1 *Foster Fed. Pr.* (3rd Ed.), § 142; *Stead v. Course*, 4 Cranch (U. S.) 403, 2 L. Ed. 660; *United States v. California &c. Co.*, 148 U. S. 31, 13 Sup. Ct. 458, 37 L. Ed. 354; *Beames Pleas in Eq.* 325. See, especially, *Langdell Eq. Pl.* (2d ed.), §§ 101, 108, making a distinction in applying this rule between pure or affirmative pleas and negative pleas. However, the plea filed in the instant case could not be held to be a negative plea, and therefore we are of the opinion that it was incumbent upon the appellees to prove the matters contained in their plea. As to the matters contained in the answer which were not in support of the plea, but which were responsive to the bill, the burden was upon the appellant to prove the allegations in its bill. As the answer was under oath, the oath therefore not having been waived, it further follows that the sworn answer was evidence in favor of the appellees as to those matters contained therein which were directly and positively responsive to the material allegations of the bill, and that as to those matters such an answer was conclusive, unless its pro-

§ 3212. **Substance of issue.**—In equity, as at law, it is generally sufficient to prove the substance of the issue.¹⁵⁸ But decrees in equity are usually more specific than ordinary judgments, and in order to obtain the particular relief prayed for it is sometimes necessary to go more into detail and to more clearly prove the specific facts than it is in order to obtain an ordinary judgment in actions at law.¹⁵⁹ Yet, on the other hand, courts of equity have power to so mould their decrees as to give complete and adequate relief according to the allegations and the proof and the justice of the cause, and they have not always been so strict as some of the old common law courts were in holding a variance fatal. And, in some instances, where through inadvertance or the like the plaintiff had omitted to make full proof of some essential fact the court would give him leave to do so even after the case had come up for hearing.¹⁶⁰ So, in exceptional cases, where justice seemed to require it, a second or re-examination of the same witness was sometimes allowed.¹⁶¹

bative force and effect was overcome by the testimony of two witnesses, or the testimony of one witness corroborated by other circumstances which were of greater probative weight than the answer. *Pinney v. Pinney*, (Fla.) 35 So. 95, and authorities cited therein. It follows, then, that in part the burden of proof rested upon the appellant and in part upon the appellees. 1 *Foster Fed. Pr.* (3rd Ed.), § 137."

¹⁵⁸ See, *Phoenix &c. Ins. Co. v. Hinesley*, 75 Ind. 1; *Johnston v. Glancy*, 4 Blackf. (Ind.) 94, 96, 97, 28 Am. Dec. 45; *Hart v. Hawkins*, 3 Bibb (Ky.) 502, 6 Am. Dec. 666, 672; *Eldridge v. Turner*, 11 Ala. 1049; *Booth v. Wiley*, 102 Ill. 84; *Loewenstein v. Rapp*, 67 Ill. App. 678; *Hooper v. Holmes*, 11 N. J. Eq. 122; *Campbell v. Bowles*, 30 Gratt. (Va.) 652; *Kline v. Triplett*, (Va.) 25 S. E. 886; *Synnott v. Shaughnessy*, 130 U. S. 572, 9 Sup. Ct. 609; *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909; *Gresley Eq. Ev.* 169.

¹⁵⁹ See, *Rockecharlie v. Rockecharlie*, (Va.) 29 S. E. 825; *Dalzell*

v. Manufacturing Co., 149 U. S. 315, 13 Sup. Ct. 886; *Rejall v. Greenhood*, 35 C. C. A. 97, 92 Fed. 945; *Vawter v. Bacon*, 89 Ind. 565; *Ahl's Appeal*, 129 Pa. St. 49, 18 Atl. 477; *Hawes v. Brown*, 75 Ala. 385; *Land v. Cowan*, 19 Ala. 297; *Kelly v. Kelly*, 54 Mich. 30, 19 N. W. 580; *Rice v. Rigley*, 7 Idaho 115, 61 Pac. 290; *Lockhart v. Leeds*, 195 U. S. 427, 25 Sup. Ct. 76; *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909.

¹⁶⁰ See, *Thexton v. Edmonston*, L. R. 5 Eq. 373; *Chichester v. Chichester*, 24 Beav. 289; *Wood v. Stane*, 8 Price 613; *Abrams v. Winshup*, 1 Russ. 526; *Hughes v. Eades*, 1 Hare 486, 488, 6 Jur. 455; 1 *Daniell Ch. Pr.* (6th Ed.) 858, 890; *Greeley Eq. Ev.* (Am. Ed.) 132-138.

¹⁶¹ See, *Wood v. Mann*, 2 Sumn. (U. S.) 316; *Lord Arundell v. Pitt*, Amb. 585; *Cox v. Allingham*, Jac. 337. But this was only done in exceptional cases. *Beach v. Fulton Bank*, 3 Wend. (N. Y.) 573; *Gray v. Murray*, 4 Johns. Ch. (N. Y.) 412; *Noel v. Fitzgerald*, 1 Hogan 135; *Lord Abergavenny v. Powell*, 1 Mer. 130.

§ 3213. **Substance of issue—Variance.**—It is not only necessary that the substance of the case made by each party should be proved, but it must be substantially the same as that which he has stated upon the record,¹⁶² for the Court will not allow a party to be taken by surprise, by the other side proving a case different from that set up in the pleadings.¹⁶³ And, as a general rule, “no facts are properly in issue unless charged in the bill, nor can relief be granted for matters not charged, although they may be apparent from other parts of the pleading and evidence; for the court pronounces its decree *secundum alegata et probata*.”¹⁶⁴ As said by one court: “It is an

¹⁶² *Hobart v. Andrews*, 21 Pick. (Mass.) 526, 534; *Bellows v. Stone*, 14 N. H. 175; *Hooper v. Strahan*, 71 Ala. 75; *Crothers v. Lee*, 29 Ala. 337; *Hope v. Johnston*, 28 Fla. 55, 9 So. 830; *Bowman v. O'Reilly*, 31 Miss. 261; *Reynolds v. Morris*, 7 Ohio St. 310; *Williams v. Starr*, 5 Wis. 534; *Gurney v. Ford*, 2 Allen (Mass.) 576; *Andrews v. Farnham*, 10 N. J. Eq. 94; *McWhorter v. McMahan*, 10 Paige (N. Y.) 386; *Sears v. Barnum*, 1 Clark Ch. (N. Y.) 139; *Singleton v. Scott*, 11 Iowa 589; *Simplot v. Simplot*, 14 Iowa 449; *Peckham v. Buffam*, 11 Mich. 529; *Holman v. Vallejo*, 19 Cal. 498; *Ohling v. Luitjens*, 32 Ill. 23; *Tuck v. Downing*, 76 Ill. 71; *Abbott v. Abbott*, 189 Ill. 488, 59 N. E. 958, 82 Am. St. 470.

¹⁶³ 1 Daniell Ch. Pr. 860.

¹⁶⁴ 1 Beach Mod. Eq. Pr., § 99; *Story Eq. Pl.* (10th Ed.), § 257; *Anderson v. Northrop*, (Fla.) 12 So. 318; *Glascott v. Lang*, 2 Phil. Ch. 310; *Phelps v. Elliott*, 35 Fed. 455; *Simms v. Guthrie*, 9 Cranch (U. S.) 19; *Eyre v. Potter*, 15 How. 42; *Boone v. Chiles*, 10 Pet. (U. S.) 177; *Hart v. Stribling*, 21 Fla. 136; *Groscholz v. Newman*, 21 Wall. (U. S.) 481; *Brainerd v. Arnold*, 27 Conn. 617; *Rubber Co. v. Goodyear*, 9 Wall. (U. S.) 788; *Marshman v. Conklin*,

21 N. J. Eq. 546; *Armstrong v. Ross*, 20 N. J. Eq. 109; *Vansciver v. Bryan*, 13 N. J. Eq. 434; *Lehigh Valley R. Co. v. McFarlan*, 30 N. J. Eq. 180; *Wilson v. Cobb*, 28 N. J. Eq. 177, and *Smith v. Axtell*, 1 N. J. Eq. 494; *Myers v. Steel Mach. Co.*, (N. J. Eq.) 57 Atl. 1080; *Riddle v. Keller*, 61 N. J. Eq. 513, 48 Atl. 818; *Stucky v. Stucky*, 30 N. J. Eq. 546, 554; see also, *Kelly v. Kelly*, 54 Mich. 30, 19 N. W. 580; *Judy v. Gilbert*, 77 Ind. 96, 40 Am. R. 289; *Kelsey v. Western*, 2 N. Y. 500; *Reynolds v. Morris*, 7 Ohio St. 310; *Kruschke v. Stefan*, 83 Wis. 373, 53 N. W. 679; *Brodie v. Skelton*, 11 Ark. 120; *Rogers v. Brooks*, 30 Ark. 612; *Hilleary v. Hurdle*, 6 Gill (Md.) 105; *Schneider v. Patton*, 175 Mo. 684, 75 S. W. 155; *McClung v. Colwell*, 107 Tenn. 592, 64 S. W. 890, 89 Am. St. 961; *Steadman v. Handy*, 102 Va. 382, 46 S. E. 380. “It is also an established rule of chancery practice, and of pleading and practice generally, that the *allegata* and *probata* must correspond. However full and convincing may be the proof as to any essential fact, unless the fact is averred, proof alone is insufficient. All the evidence offered in a case should correspond with the allegations, and be confined to the issues.” *Tate v. Pensacola Gulf &c. Co.*, 37 Fla. 439,

established doctrine of this court, that where the bill sets up a case of actual fraud, and makes that the ground for the prayer for relief, the complainant is not in general entitled to a decree by establishing some one or more of the facts, quite independent of fraud, which might of themselves create a case under a distinct head of equity from that which would be applicable to the case of fraud originally stated."¹⁶⁵ A party cannot proceed on one theory and recover on another. Thus, it has been held that he cannot proceed on the theory of an express trust and recover on an implied trust, although it turns out that the express trust, being in parol, is void under the statute of frauds.¹⁶⁶ So, where a bill charges fraud, there can be no recovery even though the facts might have justified equitable relief on some other distinct theory.¹⁶⁷ And, in a recent case, an allegation in a bill that the grantor in a deed failed to retain a certain reservation set forth in a written contract authorizing such deed, was held not sustained by proof that it was omitted by reason of an agreement between the parties that the grantee should make a separate deed for such reservation.¹⁶⁸ But the rule that the pleading and proof must correspond and that a substantial variance is generally fatal is to be applied equitably and not rigidly or technically, especially when it is invoked by a party having full knowledge of the facts during the entire progress of the cause, and therefore not misled by a pleading which, although it is not specific or is inaccurate as to some of the details, yet contains averments sufficient to support

20 So. 542, 53 Am. St. 251; quoted with approval in, *Pinney v. Pinney*, (Fla.) 35 So. 95, 100.

¹⁶⁵ *Hoyt v. Hoyt*, 27 N. J. Eq. 399, 402, citing, *Montesquieu v. Sandys*, 18 Ves. 302.

¹⁶⁶ *Mescall v. Tully*, 91 Ind. 96; see also, *Smoot v. Strauss*, 21 Fla. 611; *Hays v. Carr*, 83 Ind. 275; *Parker v. Beavers*, 19 Tex. 406; *Lantermann v. Abernathy*, 47 Ill. 437.

¹⁶⁷ *Keen v. Maple Shade &c. Land Co.*, 63 N. J. Eq. 325, 50 Atl. 467, 92 Am. St. 682; *Hoyt v. Hoyt*, 27 N. J. Eq. 399; *Babbitt v. Dotten*, 14 Fed. 19; see also, generally, *Ewing v. Sandoval &c. Co.*, 110 Ill. 290; *Robinson v. Cullom*, 41 Ala. 693;

Krusckke v. Stefan, 83 Wis. 373, 53 N. W. 679; *Dashiell v. Grosvenor*, 13 C. C. A. 593, 66 Fed. 334, 27 L. R. A. 67; but compare, *Hood v. Smith*, 79 Iowa 621, 44 N. W. 903.

¹⁶⁸ *Caton v. Raber*, (W. Va.) 49 S. E. 147. "In so far as the testimony tends to show any acts of fraud upon the part of appellant other than those alleged in the bill, that cannot avail appellee." *Pinney v. Pinney*, (Fla.) 35 So. 95, 101, citing; *Howard v. Pensacola &c. R. Co.*, 24 Fla. 560, 5 So. 356; *Tate v. Pensacola, Gulf &c. Co.*, 37 Fla. 439, 455, 20 So. 542, 53 Am. St. 251; *Parish v. Pensacola &c. R. Co.*, 28 Fla. 251, 9 So. 696.

a claim for the relief prayed for.¹⁶⁹ "It is undoubtedly a well settled rule in equity, that the decree must conform to the bill, and be warranted by it both in the relief and in the grounds of relief. Relief not embraced in the prayer of the bill cannot be decreed, nor can the relief asked for be granted upon grounds not disclosed by the bill. It is, however, no objection that the relief established by the proof is broader and stronger than that stated in the bill, or that grounds of relief not contained in the bill are established in evidence, provided the decree is warranted by the charges and prayers of the bill, and the bill sustained by the evidence."¹⁷⁰

§ 3214. **Evidence confined to issues.**—"It is the fundamental maxim, both in courts of equity and in courts of law," says Mr. Daniell, "that no proof can be admitted of any matter which is not noticed in the pleadings."¹⁷¹ In certain cases, however, evidence of particular facts may be given under general allegations, although the particular facts so intended to be proved are not specifically stated in the pleadings.¹⁷² The cases referred to, namely, those in

¹⁶⁹ Crawford v. Moore, 28 Fed. 824, 827; Moore v. Crawford, 130 U. S. 122, 9 Sup. Ct. 447; Pope v. Allis, 115 U. S. 363, 6 Sup. Ct. 69; Taft v. Taft, 73 Mich. 502, 41 N. W. 481; Stearns v. Reidy, 135 Ill. 119, 25 N. E. 762; Beers v. Botsford, 13 Conn. 146.

¹⁷⁰ Ryerson v. Adams, 6 N. J. Eq. 618; Thornton v. Ogden, 32 N. J. Eq. 723. In other words, it is sufficient if the substance of the issue be established. Phoenix &c. Ins. Co. v. Hinesley, 75 Ind. 1; see also, Goree v. Clements, 94 Ala. 337, 10 So. 906; Davis v. Guilford, 55 Conn. 351; Zeininger v. Schnitzler, 48 Kans. 63, 28 Pac. 1067; Lawrence v. Hester, 93 N. Car. 79; Morrow v. Turney, 35 Ala. 131; Offutt v. Scott, 47 Ala. 104; Keaton v. Miller, 38 Miss. 630; Ontario Bank v. Schermerhorn, 10 Paige (N. Y.) 109; Booth v. Wiley, 102 Ill. 84; Benson v. Keller, 37 Ore. 120, 60 Pac. 918. A variance between the proof and immaterial alle-

gations of the bill is not fatal to the decree. Johnston v. Glancy, 4 Blackf. (Ind.) 94, 28 Am. Dec. 45.

¹⁷¹ 1 Daniell Ch. Pr. (6th Ed.) 852; Smith v. Clarke, 12 Ves. 477, 480; Whaley v. Norton, 1 Vern. 483; Gordon v. Gordon, 3 Swanst. 400, 472; Clarke v. Turton, 11 Ves. 240; Williams v. Llewellyn, 2 Y. & J. 68; Sidney v. Sidney, 3 P. Wms. 269, 276; Hall v. Maltby, 6 Price 240, 259; Powys v. Mansfield, 6 Sim. 528, 565; Langdon v. Goddard, 2 Story (U. S.) 267; James v. M'Kernon, 6 Johns. (N. Y.) 543; Lyon v. Tallmadge, 14 Johns. (N. Y.) 501; Anderson v. Northrop, 30 Fla. 612; Barrett v. Sergeant, 18 Vt. 365; Pinson v. Williams, 23 Miss. 64; Kidd v. Manley, 28 Miss. 156; Surget v. Byers, 1 Hemp. (U. S.) 715; Craige v. Craige, 6 Ired. Eq. (N. Car.) 191; Moores v. Moores, 16 N. J. Eq. 275; Chandler v. Herrick, 11 N. J. Eq. 497.

¹⁷² Whaley v. Norton, 1 Vern. 483;

which evidence of particular facts may be given under a general allegation or charge, or namely, a case in which the character, or quality of mind, or general behavior of a party comes in issue, but this may be done in some other case as well, as, for instance, where the question of notice is raised in the pleadings by a general allegation or charge. "Thus, where the defense was a purchase for valuable consideration, without notice of a particular deed, but, in order to meet that case by anticipation, the bill had suggested that the defendant pretended that she was a purchaser for valuable consideration, without notice, and simply charged the contrary, the deposition of a witness, who proved a conversation to have taken place between himself and the third person, who was the solicitor of the defendant, and the consequent production of the deed, was allowed to be read as evidence of notice.¹⁷³ In such a case, the question whether the party has notice or not, is a fact, which should be put in issue, but the mode in which it is to be proved need not be put upon the record; for the rule that no evidence will be admitted, in support of any facts but those which are mentioned in the pleadings, requires that the facts only intended to be proved should be put in issue, and not the materials of which the proof of those facts is to consist.¹⁷⁴ Where, however, the party has not had any opportunity of disproving a particular act of notice which was proved in evidence, although not al-

Matthew v. Hanbury, 2 Vern. 187; *Moore v. Moore*, 16 N. J. Eq. 275; *Hewett v. Adams*, 50 Me. 271, 276; *Gresley Eq. Ev.* 161, et seq.; *Story Eq. Pl.* 28, 252. It has been held that relevant admissions of the defendant may be proved against him though not alleged in the bill. *Cleveland & Co. v. United States & Co.*, 52 Fed. 385; *Cannon v. Collins*, 3 Del. Ch. 132. And it may, perhaps, be stated generally, that if the allegations fairly apprise the other party of the nature of the evidence that is sought to be introduced, so that he might reasonably expect it, they will be sufficient, although somewhat general in their nature. *Moore v. Moore*, 16 N. J. Eq. 275; *Madison v. Wallace*, 2 Dana (Ky.)

61; *Lee v. Beatty*, 2 Dana (Ky.) 204. See also, *Whittaker v. Amwell Nat. Bank*, 52 N. J. Eq. 400, 29 Atl. 203; *Eppinger v. Canepa*, 20 Fla. 262. So, evidence of collateral facts by way of inducement may be admissible. *Goodman v. Sayers*, 2 J. & W. 249, 259; *Bradley v. Chase*, 9 Shepl. (Me.) 511; *Gresley Eq. Ev.* 237, 238. ¹⁷³ *Hughes v. Garner*, 2 Y. & C. 328, 335; see now, R. S. C. Ord. XIX 26. As to the discovery of particular facts under a general allegation, see *Saunders v. Jones*, L. R., 7 Ch. Div. 435; *Kuhlig v. Bailey*, W. N. (1881) 165; *Benbow v. Low*, L. R., 16 Ch. Div. 93.

¹⁷⁴ *Blacker v. Phepoe*, 1 Moll. 354; see, *Story Eq. Pl.*, §§ 28, 252, 263, 265a.

leged in the pleadings, and inquiry was directed whether he had or had not notice."¹⁷⁵ Documents containing relevant admissions have been received although not pleaded.¹⁷⁶ But it is said that if letters or writings in the hands of a party are intended to be used against the opposite party as admissions or confessions they should be mentioned in the pleadings.¹⁷⁷ And this principle, it is said, is not confined to writings, but applies to every case where the admission or confession of a party is to be made use of against him; thus, it has been held, that evidence of a confession by a party that he was guilty of a fraud, could not be read because it was not distinctly put in issue.¹⁷⁸ So, also, evidence of alleged conversations between a witness and a party to the suit, in which such party admitted that he had defrauded the other, was rejected because such alleged conversations had not been noticed in the pleadings.¹⁷⁹ Where, however, the conversation is in itself the evidence of a fact, it need not be specially mentioned: as, where the notice was communicated to the defendant by a conversation, which was made use of to prove the fact of the conversation having taken place, and not as an admission by the party that he had received notice.¹⁸⁰ It has been held that

¹⁷⁵ *Weston v. Empire Assu. Co. L. R.*, 6 Eq. 23; 1 *Daniell Ch. Pr.* 854, 855.

¹⁷⁶ See, *Davy v. Garrett*, L. R., 7 Ch. Div. 473; *Steuart v. Gladstone*, L. R., 10 Ch. Div. 626.

¹⁷⁷ 1 *Daniell Ch. Pr.* 855; *Houlditch v. Donegal*, 1 Moll. 364; *Austin v. Chambers*, 6 Cl. & F. 1; *Whitley v. Martin*, 3 Beav. 226; *Blacker v. Phepoe*, 1 Moll. 354; but see, *McMahon v. Burchell*, 2 Phil. 127, 133, 1 C. P. Coop. temp. Cott. 457, 475. See, *Moyers v. Kinnick*, 1 Tenn. Ch. App. 65, although the bill alleged one transaction, which it was charged did not constitute payment of a note, and the proof showed a different transaction, it was held that while the latter did not meet the allegations of the bill as to the particular transaction, it was admissible under a general allegation of non-payment, also made in the bill.

¹⁷⁸ *Hall v. Maltby*, 6 Price 240; *Mulholland v. Hendrick*, 1 Moll. 359; but see, *Cleveland &c. Co. v. United States Co.*, 52 Fed. 385; *Cannon v. Collins*, 3 Del. Ch. 132.

¹⁷⁹ *Farrel v. ———*, 1 Moll. 363; *McMahon v. Burchell*, 2 Phil. 127; 1 C. P. Coop. temp. Cott. 475; *Langley v. Fisher*, 9 Beav. 90, 101; *Graham v. Oliver*, 3 Beav. 124, 129; *Smith v. Burnham*, 2 Sumn. (U. S.) 612; *Jenkins v. Eldredge*, 3 Story (U. S.) 181, 283, 284; see, *Story Eq. Pl.*, § 265a, and note; *Brown v. Chambers*, *Hayes Exch.* 597; *Malcolm v. Scott*, 3 Hare 39, 63; *Brandon v. Cabiness*, 10 Ala. 155; *Bishop v. Bishop*, 13 Ala. 475; *Camden &c. R. Co v. Stewart*, 19 N. J. Eq. 343, 346, 347.

¹⁸⁰ *Hughes v. Garner*, 2 Y. & C. 328, 335; *Graham v. Oliver*, 3 Beav. 124.

evidence of a fact which is admitted by the answer may, and generally should, be rejected.¹⁸¹

§ 3215. Parol and secondary evidence.—The general rule that parol evidence is not admissible to contradict or vary the terms of a written instrument obtains in equity¹⁸² as well as at law. But owing, perhaps, more to the nature of the cases rather than to any peculiar rule of equity, parol evidence is often admitted where equitable relief is sought on the ground of fraud or mistake.¹⁸³ So, as elsewhere shown, parol evidence is often admissible to prove facts and circumstances establishing a resulting trust,¹⁸⁴ or to rebut or fortify an equity.¹⁸⁵ So, too, in most jurisdictions it is well settled that parol evidence is admissible in courts of equity, in a proper case, to show that an instrument in the form of a deed absolute on its face, or the like, is a mere security for a debt and therefore to be treated as a mortgage or the like.¹⁸⁶

¹⁸¹ *Robinson v. Philadelphia &c. R. Co.*, 28 Fed. 577; *Morris v. Morris*, 38 Fed. 776.

¹⁸² *Sullivan v. McLenans*, 2 Iowa 437, 65 Am. Dec. 780; *Hart v. Clark*, 54 Ala. 490; *Peterson v. Grover*, 20 Me. 363; *Elysville Mfg. Co. v. Okisko Co.*, 1 Md. Ch. 392; *Cooper v. Tappan*, 4 Wis. 362; *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174. It is said, however, in *Stoutenburgh v. Tompkins*, 9 N. J. Eq. 332, that courts of equity are often more liberal than courts of law in admitting parol evidence.

¹⁸³ *Story v. Gammell*, (Neb.) 94 N. W. 982; *Goode v. Riley*, 153 Mass. 585, 28 N. E. 228; *Miller v. Cotten*, 5 Ga. 341; *Givan v. Masterson*, 152 Ind. 127, 51 N. E. 237; *Bennett v. Massachusetts &c. Ins. Co.*, 107 Tenn. 371, 64 S. W. 758; *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174; see also, Vol. I, §§ 574, 575, 591–595 and numerous authorities there cited; *Townshend v. Stangroom*, 6 Ves. 328; *Joines v. Statham*, 3 Atk. 388. As explained in the sections of this

work above referred to, however, the theory is that the evidence in such cases does not contradict or vary the terms of a valid written contract, but goes rather to show that there never was any legal contract or to prevent fraud or false a superior equity and give the contract its true effect. See also, *Pioneer Gold Min. Co. v. Baker*, 23 Fed. 258.

¹⁸⁴ Vol. I, § 586. See also, *Shackleford v. Elliott*, 209 Ill. 333, 70 N. E. 745; *McMurray v. McMurray*, 180 Mo. 526, 79 S. W. 701; but compare, *De Hihns v. Free*, (S. Car.) 49 S. E. 841.

¹⁸⁵ Vol. I, § 588.

¹⁸⁶ Vol. I, § 587. See also, *Meeker v. Warren*, (N. J. Eq.) 57 Atl. 421; *Welborn v. Dixon*, (S. Car.) 49 S. E. 232; *County of Harlan Co. v. Whitney*, 65 Neb. 105, 90 N. W. 993, 101 Am. St. 610. But compare, *Ostenson v. Severson*, (Iowa) 101 N. W. 789; *Morrison v. Jones*, (Mont.) 77 Pac. 507.

§ 3216. **Weight and sufficiency of evidence.**—As a general rule it may be said that, with a few exceptions, evidence usually has the same weight and effect in equity as at law, and that it is, in most instances at least, sufficient to sustain and establish an issue by a preponderance of the evidence. But there are expressions in some cases indicating that certain matters or issues must be shown or established beyond a reasonable doubt, and even where no such rule has been announced it seems in many instances that to constitute a satisfactory preponderance of the evidence in equity the evidence may have to be clearer and more satisfactory than is ordinarily required to constitute a fair preponderance in ordinary actions at law. The old doctrine seems to have been that the evidence must “satisfy the conscience of the chancellor,” and, further than that, no definite rule could be laid down. It has frequently been said, however, that if the evidence as to a disputed fact is equally balanced, or if it does not produce a just and rational belief of its existence but leaves the mind in a state of perplexity, the party having the burden or affirmative as to such fact must fail.¹⁸⁷ So, it has been said that while circumstantial evidence may be as potent in equity as at law, the court will not be influenced by mere circumstances to adopt a conjectural conclusion, in a matter susceptible of proof, and will not indulge in presumptions and inferences not drawn from facts directly proved.¹⁸⁸ And it has also been held that the chancellor, in passing on conflicting proofs, may, and, in a proper case, will follow the probabilities, although they may be contrary to the impressions of witnesses of undoubted integrity of purpose.¹⁸⁹ There are cases in which, perhaps because of the old rule requiring the conscience of the chancellor to be satisfied as well as for the reason that they are easily manufactured, open to suspicion or the like, it is usually said that the evidence must be clear and convincing or satisfactory.¹⁹⁰

¹⁸⁷ *Hawes v. Brown*, 75 Ala. 385; *Evans v. Winston*, 74 Ala. 349; *Marlowe v. Benagh*, 52 Ala. 112; *Brandon v. Cabiness*, 10 Ala. 155; *Goerke v. Rodgers*, (Ark.) 86 S. W. 837; *Selby v. Geines*, 12 Ill. 69; *Gee v. Gee*, 32 Miss. 190; *Sterne v. Woods*, 11 Mo. 638; *Rogers v. Traders' Ins. Co.*, 6 Paige (N. Y.) 583; *Hargraves v. Miller*, 16 Ohio 338; *Wilson v. Delarack*, 3 Ohio 290. See also, *Mc-*

Guigan v. Gaines, 71 Ark. 614, 77 S. W. 52, 53, 54.

¹⁸⁸ *Orman v. Barnard*, 5 Fla. 528. See also, *Nichols v. McCarthy*, 53 Conn. 299, 23 Atl. 93.

¹⁸⁹ *Salisbury v. Salisbury*, 49 Mich. 306, 13 N. W. 602; *Lurch v. Holder*, (N. J. Eq.) 27 Atl. 81.

¹⁹⁰ *McGuigan v. Gaines*, 71 Ark. 614, 77 S. W. 52; *Doane v. Dunham*, 64 Neb. 135, 89 N. W. 640; *Rice v.*

Just what is meant by this is not entirely clear, but it apparently means that a mere slight preponderance of evidence not clearly or satisfactorily establishing the disputed fact or issue is insufficient. Cases in which the expression in question is used are mainly cases of mistake, trust, fraud, or the like, as, for instance where a resulting trust is sought to be established by parol evidence, or specific performance or cancellation or reformation is sought. Yet, on the other hand, it has been said that courts of equity will sometimes act upon circumstances and badges of fraud that might be deemed insufficient to justify a verdict in a court of law.¹⁹¹ The fact that a witness is interested as a party or otherwise does not necessarily prevent a decree from being rendered on his evidence.¹⁹² Indeed, it has been said that the very fact that men of high character are interested often makes their testimony more weighty as showing their attention is focussed on the matter in controversy.¹⁹³ But it has been held that the testimony of parties who attempt to impose on a court of equity by false statements, manufactured accounts, or the like, is insufficient and should be given no weight.¹⁹⁴ So, circumstances and known facts may sometimes establish the truth more clearly than the oaths of the parties or the written depositions.¹⁹⁵ But positive testimony has been held entitled to more weight than negative testimony or circumstances merely persuasive.¹⁹⁶ Docu-

Rigley, 7 Idaho 115, 61 Pac. 290; Sallenger v. Perry, 130 N. Car. 134, 41 S. E. 11; Bruce v. Child, 11 N. Car. 372, 381; Westbrook v. Harbeson, 2 McCord Eq. (S. Car.) 112; Layman v. Minneapolis &c. Co., 60 Minn. 136, 62 N. W. 113; Southard v. Curley, 134 N. Y. 148, 154, 31 N. E. 330, 30 Am. St. 642, 16 L. R. A. 561; Citizens' Nat. Bank v. Judy, 146 Ind. 322, 346, 347, 43 N. E. 259; 2 Pomeroy Eq. Jur., §§ 859, 1040. See also, Capelli v. Dondero, 123 Cal. 324, 55 Pac. 1057; Bodwell v. Heaton, 40 Kans. 36, 18 Pac. 901; Givan v. Masterson, 152 Ind. 127, 51 N. E. 237; Whelen v. Osgoodby, 62 N. J. Eq. 571, 50 Atl. 692; Potter v. Potter, 27 Ohio St. 84; Fritzler v. Robinson, 70 Iowa 500, 31 N. W. 61; Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 Sup. Ct. 239; Bold v. Hutch-

inson, 5 De G. M. & G. 558, 25 L. J. Ch. 598; United States v. Munroe, 5 Mason (U. S.) 572, 577.

¹⁹¹ 3 Greenleaf Ev., § 254; 1 Story Eq. Jur., §§ 190-193. See also, Chesterfield v. Janssen, 1 Atk. 301, 352; Fullagar v. Clark, 18 Ves. 481, 483.

¹⁹² Conger v. Cotton, 37 Ark. 286; Montandon v. Deas, 14 Ala. 33, 48 Am. Dec. 84.

¹⁹³ Goerke v. Rodgers, (Ark.) 86 S. W. 837, 838. See also, Peyton v. Green, 1 Eq. Cas. Abr. 11; Benson v. Le Roy, 1 Paige (N. Y.) 122.

¹⁹⁴ Atkinson v. Plumb, 45 W. Va. 626, 32 S. E. 229. See also, Kenny v. Lembeck, 53 N. J. Eq. 20, 30 Atl. 525; Hill v. Binney, 6 Ves. 738.

¹⁹⁵ Benter v. Patch, 7 Mackey (D. C.) 590.

¹⁹⁶ Kennedy v. Kennedy, 2 Ala. 571; Walker v. Walker, 2 Atk. 98.

mentary evidence properly submitted at the hearing by stipulation or otherwise is generally to be considered in the same light as evidence taken by deposition.¹⁹⁷ But, as already shown, admissions of the parties are often given greater weight and effect than ordinary evidence, and are usually conclusive when made in *judicio*.¹⁹⁸ Affidavits for preliminary action or as a foundation for ulterior proceedings are also often given conclusive effect for such purpose,¹⁹⁹ but not usually on final hearing. Indeed, *ex parte* affidavits are seldom received and considered on the final hearing, and, as there has been no opportunity for cross-examination they ought not, in any event, under ordinary circumstances, when contradicted, to be given the weight of evidence taken and heard in the usual course.

§ 3217. Objections and exceptions.—As a general rule, all the evidence offered should be received in the first instance in order to preserve it in the record,²⁰⁰ and where there is doubt as to whether a question is proper the witness should generally be required to answer.²⁰¹ Objections should be made, however, when the testimony is offered, and should be incorporated in the record, so that they may be passed upon later.²⁰² Yet it has been held proper to reserve until the hearing objections going to the competency,²⁰³ or relevancy of testimony.²⁰⁴ The objections should clearly state the particular testimony objected to and the ground of the objection.²⁰⁵ Objec-

¹⁹⁷ *Stone v. Welling*, 14 Mich. 514.

¹⁹⁸ See ante, § 3193, admissions. See also, *Domville v. Solly*, 2 Russ. 372; *Gresley Eq. Ev.* 459, 460; 3 *Greenleaf Ev.*, § 373.

¹⁹⁹ 3 *Greenleaf Ev.*, §§ 384, 385; 1 *Daniell Ch. Pr.* (5th Am. Ed.) 940. They have been received as satisfactory proof of exhibits at the hearing.

²⁰⁰ *Bilz v. Bilz*, 37 Mich. 116; *Parisian Comb Co. v. Eschwege*, 92 Fed. 721; *Lloyd v. Pennie*, 50 Fed. 4; *Blease v. Garlington*, 92 U. S. 1.

²⁰¹ *Whitehead &c. Co. v. O'Callahan*, 130 Fed. 243.

²⁰² *Williams v. Thomas*, 3 N. Mex. 324, 9 Pac. 356; *Maxim-Nordenfelt &c. Co. v. Colt's Patent &c. Co.*, 103 Fed. 39; *De Roux v. Girard*, 90 Fed.

537. See also, *Johnson v. Meyer*, 54 Ark. 437, 16 S. W. 121; *Williamson v. Johnson*, 5 N. J. Eq. 537; Vol. II, §§ 1180–1185.

²⁰³ *Goelz v. Goelz*, 157 Ill. 33, 41 N. E. 756; *Kennedy v. Meredith*, 3 Bibb (Ky.) 465; *Williams v. Vreeland*, 30 N. J. Eq. 576; *Williams v. Maitland*, 36 N. Car. 92.

²⁰⁴ *Williams v. Vreeland*, 30 N. J. Eq. 576; *Jones v. Spencer*, 2 Tenn. Ch. 776; *Diamond Drill &c. Co. v. Kelly*, 120 Fed. 282.

²⁰⁵ *Freeny v. Freeny*, 80 Md. 406, 31 Atl. 304; *Hamilton v. Southern Nevada Gold &c. Min. Co.*, 13 Sawy. (U. S.) 113, 33 Fed. 562; *Ashmead v. Colby*, 26 Conn. 287; Vol. II, §§ 882, 883.

tions are generally regarded as waived unless the attention of the chancellor is called to them,²⁰⁶ and will not be considered on appeal.²⁰⁷ So there may be a waiver by other conduct inconsistent with any objection;²⁰⁸ and a cross-examination with knowledge of the incompetency of the witness and without objection has been held to be a waiver.²⁰⁹ But it is said that an express waiver of an objection must be entered on the record.²¹⁰ The subject of objections and exceptions where there has been a reference to a master will be considered in another chapter.

²⁰⁶ *Babcock v. Carter*, 117 Ala. 575, 23 So. 487, 67 Am. St. 193; *Seals v. Robinson*, 75 Ala. 363; *Brewer v. Browne*, 68 Ala. 210; *Skinner v. Campbell*, 44 Fla. 723, 33 So. 526; *Clarke v. Saxon*, 1 Hill Eq. (S. Car.) 69; *Van Namee v. Groot*, 40 Vt. 74.

²⁰⁷ *Pinney v. Pinney*, (Fla.) 35 So. 95; *Ocala Foundry &c. Works v. Lester*, (Fla.) 38 So. 56, 64. See also, *Hillier v. Farrell*, 185 Mass. 434, 70 N. E. 424. But compare, *Goelz v. Goelz*, 157 Ill. 33, 41 N. E. 756. As elsewhere shown, the admission of improper evidence is often regarded as harmless, within limits,

on the theory that the chancellor, in making his decree, regarded only the proper evidence.

²⁰⁸ *Kelsey v. Hobby*, 16 Pet. (U. S.) 269, 10 L. Ed. 961. See also, *Bunnel v. Stoddard*, 2 Am. L. Rec. 145, 4 Fed. Cas. No. 2135.

²⁰⁹ See, 3 *Greenleaf Ev.*, § 369; *United States v. Hair Pencils*, 1 Paine (U. S.) 400; *Charitable Co. v. Sutton*, 2 Atk. 400; *Sutton v. Wilson*, 1 Vern. 254; *Flagg v. Mann*, 2 Sumn. (U. S.) 486; Vol. II, § 721.

²¹⁰ *American Saddle Co. v. Hogg, Holmes* (U. S.) 177, 1 Fed. Cas. No. 316.

CHAPTER CLVII.

REFERENCE TO MASTER.

Sec.	Sec.
3218. Discretionary.	3227. Master's report.
3219. In what cases.	3228. Submitting draft of report.
3220. Hearing on bill and answer— Master not to take testimony.	3229. Objections and exceptions before master.
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3222. Duty of parties to prosecute reference.	3231. Exceptions to report.
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3224. Objections to evidence.	3233. Action on exceptions.
3225. Taking additional testimony after time fixed.	3234. Recommittal—Re-reference.
3226. When evidence should be reported.	3235. Correction of report — Confirmation.
	3236. Weight to be given master's finding.

§ 3218. **Discretionary.**—Whether a reference to a master shall be made is a matter that is generally left very largely to the discretion of the court. Where a reference to a master is proper it is generally within the power of the court in its discretion either to order a reference, even without consent of the parties,¹ or to determine the matter without a reference.² In the absence of some special rule to that

¹ Williams v. Benton, 24 Cal. 424; Smith v. Rowe, 4 Cal. 6; State v. Orwig, 25 Iowa 280; State v. McIntyre, 53 Me. 214; Nephi Irr. Co. v. Jenkins, 8 Utah 369, 31 Pac. 986; Shiras Eq. Pr. 41. See also, Bond v. Welcomes, 61 Minn. 43, 63 N. W. 3; Green v. Green, 50 S. Car. 514, 27 S. E. 952, 62 Am. St. 846; Commercial Banks v. McAuliffe, 92 Wis. 242, 66 N. W. 110; note in 79 Am. Dec. 207.

² Levert v. Redwood, 9 Port. (Ala.) 79; Bryan v. Morgan, 35 Ark. 113; Bussey v. Bussey, 71 Mich. 504, 39 N. W. 847; Barnebee v. Beckley, 43 Mich. 613, 5 N. W. 976; Goodrich v. Parker, 1 Minn. 195, exceptions; Powell v. Kane, 5 Paige (N. Y.) 265, impertinence; Fortune v. Watkins, 94 N. Car. 304; Goddard v. Leech, Wright (Ohio) 476. In re Weed, 163 Pa. St. 600, 30 Atl. 278; Phillips's Appeal, 68 Pa. St. 130; Buchanan v. Alwell, 8 Humph. (Tenn.) 516; New York Cent. Trust Co. v. Madden, 17

effect in the particular jurisdiction a reference is not strictly a matter of right,³ and it has been held that it should not be made on the motion of a party as of course.⁴ A party is entitled to the judgment of the court especially upon issues of law, and the court should not abdicate its functions by referring the whole cause to a master to try and determine all the issues,⁵ although it may do so where the parties consent.⁶ The constitution or law of the particular jurisdiction may also prohibit a reference to a master, and a constitutional provision that "the testimony in causes in equity shall be taken in like manner as in cases at law," has been held to have that effect.⁷ But in the same jurisdiction under the statute a compulsory reference may now be ordered in cases where the taking of a long account is involved either in law or equity.⁸

§ 3219. In what cases.—References are most often made in cases of accounting or where it becomes necessary to investigate and take

C. C. A. 236, 70 Fed. 451; *Kelley v. Boettcher*, 29 C. C. A. 14, 85 Fed. 55; *Brown v. Grove*, 25 C. C. A. 644, 80 Fed. 564. But see, *St. Colombe v. United States*, 7 Pet. (U. S.) 625; *French v. Gibbs*, 105 Ill. 523.

³*Manning v. Ludington*, 6 Ohio Dec. (Reprint) 620, 7 Am. L. Rec. 117, and authorities in last two notes, *supra*.

⁴*Barnes v. Haynes*, 16 Gray (Mass.) 34; *Faltoute v. Haycock*, 2 N. J. Eq. 105; *Corning v. Baxter*, 6 Paige (N. Y.) 178; *Manning v. Ludington*, 6 Ohio Dec. (Reprint) 620, 7 Am. L. Rec. 117.

⁵*Early Times &c. Co. v. Zeiger*, (N. Mex.) 66 Pac. 532; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355; *Garinger v. Palmer*, 61 C. C. A. 436, 126 Fed. 906; *Walker v. Kinnare*, 22 C. C. A. 75, 76 Fed. 101. But see, *Littlejohn v. Regents*, 71 Wis. 437, 37 N. W. 346; *Jordan v. Warner's Estate*, 107 Wis. 550, 83 N. W. 946.

⁶*Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355; *Haggett v. Welsh*, 1 Sim. 134, 2 Eng. Ch. 134. See also,

Memphis v. Brown, 20 Wall. (U. S.) 289.

⁷*Brown v. Runals*, 14 Wis. 693, 697.

⁸*Winnebago County v. Dodge County*, (Wis.) 106 N. W. 255. And in most jurisdictions a compulsory reference may be made in a proper case in equity. See *Clarkson v. Hoyt*, (Cal.) 36 Pac. 382; *Smith v. Pollock*, 2 Cal. 92; *Grim v. Norris*, 19 Cal. 140, 79 Am. Dec. 206; *Huston v. Wadsworth*, 5 Colo. 213; *Wilson v. Union Distilling Co.*, (Colo.) 66 Pac. 170; *Mackenzie v. Flannery*, 90 Ga. 590, 16 S. E. 710; *Klutts v. McKenzie*, 65 N. Car. 102; *Galbraith v. McCormick*, 23 Kans. 706; *Creve Coeur &c. Co. v. Tamm*, 138 Mo. 385, 39 S. W. 791; *Burt v. Harrah*, 66 Iowa 643; *St. Paul &c. R. Co. v. Gardner*, 19 Minn. 132, 18 Am. R. 334; *Camp v. Ingersoll*, 86 N. Y. 433; *Green v. Green*, 50 S. Car. 514, 27 S. E. 952, 62 Am. St. 846. In many of these cases it is held that the constitutional provision as to right of trial by jury does not apply to prevent a reference.

an account. But there are other cases in which a reference is frequently made. In a recent text-book it is said: "Wherever it is necessary, in the progress of a cause, to take an account, or to investigate the title of persons to property affected by the suit, or to make any other inquiries necessary to properly inform the court so that it may be in a position to determine and adjust the rights of the parties in interest; or where some special ministerial act is to be done, as to sell property; and in other similar cases,—the court will refer the particular matter to a master in chancery, who is an officer of the court, and whose duty it is to thereupon comply with the order of the court, and report to the court the facts of such compliance."⁹ A more definite, and at the same time more comprehensive, statement is as follows: "The matters which are ordinarily referred to masters in chancery are inquiries, as to whether pleadings or other proceedings in a suit in equity contain impertinence or scandal; as to who are the heirs, next of kin, creditors, or members of a particular class of legatees of a person whose estate is in the hands of the court for distribution; as to whether the title to real estate is good; and as to the state of the law of a foreign country; as to whether one of two books or other publications is pirated from the other; or as to the amount of damages suffered by the granting or withholding of an injunction; the taking of accounts; the computation of interest; the settlement of conveyances, and other deeds; the selling of property; the appointment of trustees, receivers and guardians; and the superintendence of the performance of their duties by receivers."¹⁰

§ 3220. Hearing on bill and answer—Master not to take testimony.—As already intimated it is usually within the discretion of the court after the issues are formed to order a reference to take testimony.¹¹ But where the complainant has the cause set down for hearing upon the bill and answer, and the answer is to be taken as true, according to the rule elsewhere stated, it has been held that the facts are to be ascertained from the bill and answer alone and that the court should not refer the cause to a master to take testimony and report.¹²

⁹ Shipman Eq. Pl. 109. See also, S. E. 818; Farmers' Mut. Ins. Assoc. Beach Mod. Eq. Pr., §§ 672, 680, et v. Berry, 53 S. Car. 129, 31 S. E. 53; seq.; Adams Eq. (8th Ed.) 378, 379. McSween v. McCown, 21 S. Car.

¹⁰ Foster Fed. Pr., § 307.

371; Bank v. Fenwell, 55 S. Car. 379, 33 S. E. 485.

¹¹ Grob v. Cushman, 45 Ill. 119; Davis v. Davis, 30 Ill. 180; Barnwell v. Marion, 58 S. Car. 459, 36

¹² Irvine v. Epteln, (Fla.) 33 So. 1003; Byrd v. Belding, 18 Ark. 118;

§ 3221. **Issues to be first determined—Scope of order.**—As a general rule the main issues as to the general rights of the parties should first be made up and determined,¹³ so far at least as to make it appear that a reference would be proper and to settle as far as may be the questions of law, and the order should generally give directions or instructions as to the principles by which the master is to be guided and the scope of the matter referred.¹⁴ A master derives his authority from the order of reference and cannot, ordinarily, extend his inquiry beyond the matters expressly referred.¹⁵ But the matter of practice before the master is now regulated very largely in the federal courts by a general equity rule giving the master authority to regulate the proceedings before him to a great extent.¹⁶ The order should not be more extensive than the scope of the pleadings and the master cannot ordinarily go beyond their scope;¹⁷ nor can he go

Franklin v. Meyer, 36 Ark. 96; Hicks v. Hogan, 36 Ark. 298; Owens v. Rhodes, 10 Fla. 319; Egerton v. Reilly, 1 Gill & J. (Md.) 385; Jones v. Douglass, 1 Tenn. Ch. 357, 360; Carey v. Williams, 1 Lea (Tenn.) 51; Baltimore &c. Co. v. Williams, 94 Va. 422, 26 S. E. 841; Neely v. Jones, 16 W. Va. 625, 37 Am. R. 794; Walker v. Kinnare, 22 C. C. A. 75, 76 Fed. 101; Ward v. Paducah &c. R. Co., 4 Fed. 862; Columbian &c. Co. v. Mercantile Trust &c. Co., 53 C. C. A. 33, 113 Fed. 23. But a reference has been held proper where the pleadings show a necessity therefor. Briggs v. Neal, 56 C. C. A. 572, 120 Fed. 224. And see as to practice in Vermont on foreclosure of mortgage. Hathaway v. Hagan, 64 Vt. 135, 24 Atl. 131. See generally Adams Eq. (8th ed.) 380.

¹³ Franklin v. Meyer, 36 Ark. 96; Owens v. Rhodes, 10 Fla. 319; Kay v. Fowler, 7 T. B. Mon. (Ky.) 593; Sharp v. Morrow, 6 T. B. Mon. (Ky.) 300; Hudson v. Trenton &c. Co., 16 N. J. Eq. 475; Remsen v. Remsen, 2 Johns. Ch. (N. Y.) 495; Carey v. Williams, 1 Lea (Tenn.) 51. As to the old English practice requiring

"a state of facts" see 2 Daniell Ch. Pr. (5th ed.) 1199, 1200, 1201; 2 Beach Mod. Eq. Pr., § 688. See also Adams Eq. (8th ed.) 382, 383.

¹⁵ Henderson v. Huey, 45 Ala. 275; White v. Reviere, 57 Ga. 386; Howe v. Russel, 36 Me. 115; Winn v. Albert, 2 Md. Ch. 169; Stonington Sav. Bank v. Davis, 15 N. J. Eq. 30; Jones v. Massey, 9 S. Car. 376; Maury v. Lewis, 10 Yerg. (Tenn.) 115; Ballard v. McMillan, 5 Tex. Civ. App. 679, 25 S. W. 327; Bate &c. Co. v. Gillette, 28 Fed. 673; Taylor v. Robertson, 27 Fed. 537; Farmers' &c. Trust Co. v. Central Railroad, 2 Fed. 656; Gordon v. Hobart, 2 Story (U. S.) 243.

¹⁶ United States Eq. Rule 77. Perdue v. Brooks, 95 Ala. 611, 11 So. 282.

¹⁷ Levert v. Redwood, 9 Port. (Ala.) 79; Waterman v. Curtis, 26 Conn. 241; Mackenzie v. Flannery, 90 Ga. 590, 16 S. E. 710; Potter v. Howe, 141 Mass. 357, 6 N. E. 233; Newton Rubber Works v. De Las Cases, 182 Mass. 436, 65 N. E. 816; Consequa v. Fanning, 3 Johns. Ch. (N. Y.) 587; Caldwell v. Leiber, 7 Paige (N. Y.) 483; but see, Nashua

behind the order, which must be accepted by him as conclusive of all matters covered by it.¹⁸

§ 3222. Duty of parties to prosecute reference.—The United States equity rules provide that, whenever a reference is made, the party at whose instance or for whose benefit it was directed shall cause the same to be presented to a master for a hearing on or before the rule-day next succeeding the date of the order for a reference. If he fails to do so the adverse party may forthwith cause proceedings to be had before the master at the costs of the party who procured the reference.¹⁹ It is also held in other jurisdictions to be the duty of the party obtaining the reference to prosecute it in the first instance,²⁰ although under the old practice it was usually held to rest primarily upon the plaintiff.²¹ It is the duty of the master to assign a time and place for the proceedings before him and due notice thereof must be given.²²

§ 3223. Evidence before master.—In the absence of any restriction in the order the master usually has power to receive legitimate evidence for the proper determination of the matter referred,²³ and if it can be ascertained only by evidence he may do so, although the order does not particularly empower him to take testimony.²⁴ The evidence may generally be documentary or by depositions, or viva voce.²⁵ But if the testimony is taken orally it should be reduced

&c. R. Co. v. Boston &c. R. Co., 49 Fed. 774.

¹⁸ Izard v. Bodine, 9 N. J. Eq. 309; Mulford v. Williams, 8 N. J. Eq. 536; Terry v. Robbins, 122 Fed. 725. See also, Deitch v. Staub, 53 C. C. A. 137, 115 Fed. 309; Gass v. Stinson, 2 Sumn. (U. S.) 605; Baurle v. Long, 165 Ill. 340, 46 N. E. 227; Ellis v. Ellis, (Tenn. Ch. App.) 62 S. W. 51; Smith v. Swain, 7 Rich. Eq. (S. Car.) 112.

¹⁹ United States Eq. Rule 74.

²⁰ Camden &c. R. Co. v. Stewart, 19 N. J. Eq. 343; Quackenbush v. Leonard, 10 Paige (N. Y.) 131.

²¹ See, 2 Daniell Ch. Pr. 792.

²² U. S. Eq. Rule 75. See also,

Bernie v. Vandever, 16 Ark. 616; Kerosene Lamp &c. Co. v. Fisher, 1 Fed. 91; Ballard v. Lippman, 32 Fla. 481, 14 So. 154; Wardlaw v. Erskine, 21 S. Car. 359; Hubbard v. Camperdown Mills, 25 S. Car. 496, 1 S. E. 5; Moore v. Bruce, 85 Va. 139, 7 S. E. 195; King v. Bryant, 3 M. & C. 191; 1 Newland Ch. Pr. 324.

²³ Goodwin v. McGehee, 15 Ala. 232.

²⁴ Story v. Livingston, 13 Pet. (U. S.) 359.

²⁵ United States Eq. Rule 77. See also, Grob v. Cushman, 45 Ill. 119; Bennett Office Master, 6; McDougald v. Dougherty, 11 Ga. 570; Taylor v. Young, 2 Bush (Ky.) 428; Story v. Livingston, 13 Pet. (U. S.) 359, 10

to writing,²⁶ and, indeed, all the evidence should usually be in the record. It is also sometimes expressly provided, as in the United States equity rules, that all affidavits, depositions and documents previously read or used in the court may be used before the master.²⁷ In general, the ordinary rules of evidence obtain before the master,²⁸ but, he should, perhaps, incline toward admitting rather than excluding evidence in case of doubt.²⁹ The master may be, and generally is, authorized to compel the production of books and papers,³⁰ in a proper case. And he may take evidence as to matters of detail and facts necessary or proper to the application of the principles of the decree.³¹

§ 3224. Objections to evidence.—The master has power and authority to rule on objections to the evidence,³² at least in the first instance. But, ordinarily, unless the evidence is clearly inadmissible he should receive it subject to the objections, so that it may be brought into the record and the matter be passed on by the court and the evidence be considered without a re-reference if the court should deem it admissible.³³ An objection should, however, be made

L. Ed. 200; *Foot v. Silsby*, 3 Blatchf. (U. S.) 507, 9 Fed. Cases No. 4920; *Gresley Eq. Ev.* 503.

²⁶ *Brockman v. Aulger*, 12 Ill. 277; *Taylor v. Cawthorne*, 17 N. Car. 221.

²⁷ United States Eq. Rule 80.

²⁸ 2 Barbour Ch. Pr. (2nd. ed.) 493. See also, *Smith v. Althus*, 11 Ves. 564; *Gresley Eq. Ev.* 503. As to examination of parties by master, see, *Hollister v. Barkley*, 11 N. H. 501; *Jackson v. Jackson*, 3 N. J. Eq. 96; *McDougald v. Dougherty*, 11 Ga. 570; *Winter v. Wheeler*, 7 B. Mon. (Ky.) 25.

²⁹ Where testimony is taken before an examiner for use on the trial, and there is doubt as to the relevancy or propriety of a question asked on cross-examination, the witness should generally be required to answer. *Whitehead & Hoag Co. v. O'Callahan*, 130 Fed. 243. See also, *Brown v. Worster*, 113 Fed. 20; *Kansas L. & T. Co. v. Sedalia Elec. R. &c. Co.*, 108 Fed. 702. It is gener-

ally better to receive the evidence, subject to objections, so that the court may pass upon it afterwards.

³⁰ *Brockman v. Aulger*, 12 Ill. 277; *Hallett v. Hallett*, 2 Paige (N. Y.) 432; *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 513; *Goss Printing-Press Co. v. Scott*, 119 Fed. 941; United States Eq. Rule 77; but see, *Cartee v. Spence*, 24 S. Car. 550.

³¹ *Franklin v. Meyer*, 36 Ark. 96, 109; *Atwood v. Shenandoah Val. R. Co.*, 85 Va. 966, 9 S. E. 748.

³² *Ellwood v. Walter*, 103 Ill. App. 219; *Kohlmeyer v. Kohlmeyer*, 6 Pa. Co. Ct. 609; *O'Malley v. O'Malley*, 10 Wkly. Notes Cas. (Pa.) 32; *Wooster v. Gumbirner*, 20 Fed. 167.

³³ *Kansas L. & T. Co. v. Sedalia Elec. R. &c. Co.*, 108 Fed. 702. See also, *Ellwood v. Walter*, 103 Ill. App. 219; *Hann v. Barnegat &c. Imp. Co.*, (N. J. Eq.) 2 Atl. 928; *Kohlmeyer v. Kohlmeyer*, 6 Pa. Co. Ct. 609.

when the evidence is offered, and an exception should be taken.³⁴ This is the safer course and is generally required. In some jurisdictions it is the practice on objections to evidence, or at least when the master excludes evidence, to bring the matter at once before the chancellor for his ruling or direction;³⁵ but, as already shown, it is generally better to admit the evidence, with the objection, in case of doubt, and the practice of interrupting the proceedings and referring such matters to the chancellor, as each question arises, is not usually looked upon with favor and has often been discountenanced.³⁶ The manner of objecting and excepting to the master's report, or otherwise attacking it, will be considered in a subsequent section.

³⁴ *Taylor v. Kilgore*, 33 Ala. 214; *Whalen v. Stephens*, 193 Ill. 121, 61 N. E. 921; *Williams v. Thomas*, 3 N. Mex. 324, 9 Pac. 356; *Pratt v. Adams*, 7 Paige (N. Y.) 615; *Read v. Winston*, 4 Hen. & Mun. (Va.) 450; *Troy Iron &c. Factory v. Corning*, 6 Blatchf. (U. S.) 328, 24 Fed. Cas. No. 14196. See, *Marra v. Bigelow*, 180 Mass. 48, 61 N. E. 275.

³⁵ *Dickinson v. Torrey*, 91 Ill. App. 297; *Schwarz v. Sears*, Walk. (Mich.) 19.

³⁶ *Rusling v. Bray*, 37 N. J. Eq. 174; *Dotterer v. Saxton*, 1 Wkly. Notes Cas. (Pa.) 218; *Hoe v. Scott*, 87 Fed. 220; *Union &c. Refinery v. Mathlesson*, 3 Cliff. 146, 24 Fed. Cas. No. 14398; *Welling v. LaBau*, 23 Blatchf. (U. S.) 305, 32 Fed. 293; *Lull v. Clark*, 20 Fed. 454. See also, *Collins v. Jackson*, 43 Mich. 558, 561, 5 N. W. 1052. Speaking of this practice, in a recent case, the court says: "This does not seem to me to be in accordance with the precedent or proper practice. The court appoints the master with special reference to his fitness to perform the duties imposed upon him. He is the court's representative, and it is his duty to pass upon all the questions of procedure as they come before him.

His action is subject to review of the court, but it must be only when he has concluded his labors, and the court has before it all the data upon which his conclusions are founded. The duty of the master is to hear the parties fully, 'directing the mode in which the matters requiring evidence shall be proved before him,' as provided for in the seventy-seventh rule in equity. It is necessary that he should be given the power to avoid delays and confusion, and to relieve the court of the necessity of passing upon the materiality of every disputed question as it may arise in the progress of the hearing. Errors made by the master can be corrected upon the coming in of his report upon exceptions properly taken. Upon the coming in of the report the parties can file their exceptions founded upon previous objections and have the court pass upon their validity. It would be productive of interminable delay and much vexation if all the disputed questions upon a hearing before the master should, as they arise, be brought before the court for revision and approval." *Hoe v. Scott*, 87 Fed. 220, 221.

§ 3225. **Taking additional testimony after time fixed.**—It is usually left to the master to fix a reasonable time for taking and closing the testimony and he ought not to open the case for further proof after that time without special cause.³⁷ But the master usually has discretionary power to reopen the case for further evidence,³⁸ at least up to the time when the draft of his report has been submitted to counsel,³⁹ and, in exceptional cases even up to the time his report is finally settled.⁴⁰ But after the report is filed it is for the court to determine whether the matter shall be again referred to a master.⁴¹ If the time for closing testimony has been fixed by agreement of the parties, it is said to be discretionary with the master as to whether he will take testimony after the expiration of such time.⁴² And it has been held that even when the time has been fixed by the court, the parties may waive such limitation as to time and continue to take testimony thereafter.⁴³ The rule forbidding a re-examination of a witness, under ordinary circumstances, after his examination has once been closed, applies to proceedings before a master, and such a re-examination should not be allowed unless an order is obtained therefor.⁴⁴

§ 3226. **When evidence should be reported.**—As a general rule, in the absence of an order to that effect, the master is not to report the evidence, but it is within the discretion of the court to order the master to report the evidence before him.⁴⁵ If not so ordered the master is not required, in the absence of any rule or statute to that

³⁷ *Remsen v. Remsen*, 2 Johns. Ch. (N. Y.) 495.

³⁸ *Oliver v. Wilhite*, 201 Ill. 552, 66 N. E. 837; *Richardson v. Wright*, 58 Vt. 367, 5 Atl. 287.

³⁹ *Tyler v. Simmons*, 6 Paige (N. Y.) 127; *Burgess v. Wilkinson*, 7 R. I. 31; *Central Trust Co. v. Marletta, &c. R. Co.*, 75 Fed. 41; *Piper v. Brown*, Holmes 196, 19 Fed. Cas. No. 11181; *Whiteside v. Pulliam*, 25 Ill. 285.

⁴⁰ *Pattison v. Hull*, 9 Cow. (N. Y.) 747; *Atwood v. Shenandoah Val. R. Co.*, 85 Va. 966, 9 S. E. 748; *Central Trust Co. v. Richmond &c. R. Co.*, 69 Fed. 761.

⁴¹ *National &c. Co. v. Dayton &c. Co.*, 91 Fed. 822.

⁴² *Messinger's Appeal*, (Pa.) 1 Atl. 260.

⁴³ *Harding v. Harding*, 79 Ill. App. 590; *Hoofstittler v. Hoofstittler*, 172 Pa. St. 575, 33 Atl. 753.

⁴⁴ *Remsen v. Remsen*, 2 Johns. Ch. (N. Y.) 495; *Pearson v. Darrington*, 32 Ala. 227. See also, *Nece v. Pruden*, 8 Phila. (Pa.) 350.

⁴⁵ *Bowers v. Cutler*, 165 Mass. 441, 43 N. E. 188; *Lovejoy v. Churchill*, 29 Vt. 151. See also, *Gleason &c. Co. v. Hoffman*, 168 Ill. 25, 48 N. E. 148; *Freeland v. Wright*, 154 Mass. 492, 28 N. E. 678; *Arnold v. Slaughter*, 36 W. Va. 589.

effect, to report all the evidence;⁴⁶ but when properly requested by a party as the basis for an exception, the master must report so much of the evidence as relates thereto.⁴⁷ This is generally necessary in order to obtain a review of the master's findings as to such matter.⁴⁸ But, as already intimated, where a cause is heard before a master under a rule directing him to hear the parties and report his findings of fact and law to the court, the master is not required to report the evidence, in the absence of a request before or during the hearing.⁴⁹

§ 3227. **Master's report.**—It is usually the duty of the master to make a general report embracing the whole matter referred to him by the particular order or decree.⁵⁰ But, as already shown, it is not, ordinarily, within his province to determine the entire case including both principles of law and all the issues of fact and thus usurping the functions of the court, and there are cases in which he may make a separate report as to particular matters requiring the immediate action of the court. Upon this general subject it is said by Mr. Adams:⁵¹ "When the master has disposed of all objections,

⁴⁶ *Vaughan v. Smith*, 69 Ala. 92; *Mahone v. Williams*, 39 Ala. 202; *Kirkman v. Vanlier*, 7 Ala. 217; *Goodman v. Jones*, 26 Conn. 264; *Prince v. Cutler*, 69 Ill. 267; *Simmons v. Jacobs*, 52 Me. 147; *Bailey v. Myrick*, 52 Me. 132; *Hemiup, Matter of*, 3 Paige (N. Y.) 305; *Richie v. Levy*, 69 Tex. 133, 6 S. W. 685; *Mott v. Harrington*, 15 Vt. 185; *Herrick v. Belknap*, 27 Vt. 673; *Enright v. Amsden*, 70 Vt. 183, 40 Atl. 37; *Garner v. Beaty*, 7 J. J. Marsh. (Ky.) 223; *Sibert v. Kelly*, 5 J. J. Marsh. (Ky.) 81; *Faucett v. Mangum*, 5 Ired. Eq. (N. Car.) 53, 49 Am. Dec. 432; *Pilkington v. Cotten*, 2 Jones Eq. (N. Car.) 238; *Mitchell v. Walker*, 2 Ired. Eq. (N. Car.) 621. See also, *McKinney v. Pierce*, 5 Ind. 422; *Parker v. Nickerson*, 137 Mass. 487.

⁴⁷ *Heffron v. Gore*, 40 Ill. App. 257; *Huling v. Farwell*, 33 Ill. App. 238; *East Tennessee Land Co. v. Leeson*, 188 Mass. 37, 66 N. E. 427; *Safford*

v. Old Colony R. Co., 168 Mass. 492, 47 N. E. 417; *Johnson v. Lewis*, 2 Strobb. Eq. (S. Car.) 157; *Donnell v. Columbian Ins. Co.*, 2 Sumn. (U. S.) 366, 7 Fed. Cas. No. 3987; *Greene v. Bishop*, 1 Cliff. (U. S.) 186, 10 Fed. Cas. No. 5763. See also, *Warren v. Lawson*, 117 Ala. 339, 23 So. 65; *Sutterfield v. Magowan*, 12 S. Dak. 139, 80 N. W. 180; *Ward v. Ward*, 40 W. Va. 611, 21 S. E. 746, 52 Am. St. 911.

⁴⁸ *Arter v. Chapman*, 4 Ohio Dec. (Reprint) 294, 1 Clev. L. R. 226; *Williams v. Wager*, 64 Vt. 326, 24 Atl. 765; *Sheffield &c. Coal &c. Co. v. Gordon*, 151 U. S. 285, 14 Sup. Ct. 343.

⁴⁹ *Moore v. Dick*, (Mass.) 72 N. E. 967. See also, *Parker v. Nickerson*, 137 Mass. 487.

⁵⁰ 2 Daniell Ch. Pr. (5th ed.) 1294; *Adams Eq.* (8th ed.) *385.

⁵¹ *Adams Eq.* *384, *385. See also, 2 Beach Mod. Eq. Pr. 694.

and come to a conclusion on the matters referred, he settles and signs his report, and such report is then filed. The ordinary mode of framing a report is to refer separately to each of the directions in the decree, and then, with respect to each direction, first to mention on what evidence the master has proceeded,⁵² and then to state the conclusion at which he has arrived. In stating his conclusion, he should so far detail the facts which warrant it as may enable the court to judge of its correctness;⁵³ and it is frequently advantageous, though not necessary, that he should also state the reasons which have induced his decision.⁵⁴ But he must not omit the conclusion itself, or state evidence, or circumstances which are presumptive evidence, without finding whether they amount to a satisfactory proof.⁵⁵ And if liberty be given, as it frequently is, to state special circumstances, he should state, not the evidence, but the facts proved, as on a special verdict at law.⁵⁶ If any of the inquiries directed by the decree are such as cannot conveniently be delayed until the general report, the master may make a separate report, which is prepared, disputed and confirmed in the same manner as a general one; the only difference being that when it is intended to act on such a report, the cause is not set down for further directions, but a petition is presented praying such directions as are consequent on the separate report. Subject to this right of making separate reports the rule is, that a master's report must dispose of all matters referred, either by actual findings on such section of the decree, or by pointing out what matters of reference have been waived, and what has been disposed of by separate reports; and that the omission of any such

⁵² See, *Grant, In re.*, 10 Sim. 573; *Meux v. Bell*, 1 Hare 73, 93. See also, *Agnew v. Whitney*, 11 Phila. (Pa.) 298.

⁵³ See, *Nims v. Nims*, 20 Fla. 204; *Gage v. Arndt*, 121 Ill. 491, 13 N. E. 138; *Green v. Lanier*, 5 Helsk. (Tenn.) 662; *Brainerd v. Arnold*, 27 Conn. 617; *Van Slyke v. Hyatt*, 46 N. Y. 259.

⁵⁴ See, *Frazier v. Swain*, 36 N. J. Eq. 156; but compare, *Jackson v. Jackson*, 3 N. J. Eq. 96; *Lundell v. Cheney*, 50 Minn. 470, 52 N. W. 918; *Herrick v. Belknap*, 27 Vt. 673; *Evans v. Evans*, 2 Coldw. (Tenn.)

143; *Lawrence v. Lawrence*, 3 Paige (N. Y.) 267.

⁵⁵ *Lee v. Willock*, 6 Ves. 605; *Meux v. Bell*, 1 Hare 73, 91; *Champernown v. Scott*, 4 Mad. 209; *Johnson v. Sanford*, 13 Conn. 461. See also, *Pilkington v. Cotten*, 2 Jones Eq. (N. Car.) 238; *Board of Trustees &c. v. Huston*, 12 Ind. 276; *Roberts v. Barker*, 63 N. H. 332.

⁵⁶ *Marlborough v. Wheat*, 1 Atk. 454. See also, *Hemlup, Matter of*, 3 Paige (N. Y.) 305; *Goodman v. Jones*, 26 Conn. 264; *Bailey v. Myrick*, 52 Me. 132; *State v. Peterson*, 142 Mo. 526, 39 S. W. 453.

matters, or the introduction of any matters not referred to him, will render his report erroneous."⁵⁷ But this last statement is, perhaps a little too broad, as immaterial omissions will not necessarily vitiate the report,⁵⁸ nor will the inclusion of unnecessary matter necessarily vitiate it in all cases.⁵⁹ And in taking accounts a full statement thereof should generally be made, and not a mere statement of the balance.⁶⁰

§ 3228. Submitting a draft of report.—It is customary, and, indeed, essential in some jurisdictions, to submit a draft of the report to counsel before filing it, so that objections thereto may be made before the master and the report corrected by the master, if necessary,⁶¹ but this depends largely upon local practice and the rule in the particular jurisdiction. It was the usual practice in England,⁶² and in the federal courts before the adoption of the United States equity rule 83, and is still the practice in some of the federal courts,⁶³ but in others, and in some of the state courts it seems to be unnecessary.⁶⁴

§ 3229. Objections and exceptions before master.—As a general rule, in most jurisdictions, objections must be made before the master as preliminary to exceptions to his report, and according to the better

⁵⁷ *Winter v. Innes*, 4 M. & C. 101; *Jenkins v. Bryant*, 6 Sim. 603; *Gayler v. Fitzjohn*, 1 Keen 469.

⁵⁸ See, *Cook v. Stevenson*, 30 Mich. 242.

⁵⁹ *Topliff v. Jackson*, 12 Gray (Mass.) 565; *National Bank &c. v. Sprague*, 23 N. J. Eq. 81. See also, *Parker v. Simpson*, 180 Mass. 334, 62 N. E. 401.

⁶⁰ *O'Neill v. Perryman*, 102 Ala. 522, 14 So. 898; *Nims v. Nims*, 20 Fla. 204; *Dewing v. Hutton*, 40 W. Va. 521, 21 S. E. 780. See also, *Robertson v. Baker*, 11 Fla. 192; *June v. Myers*, 12 Fla. 310; *Moore v. Huntington*, 17 Wall. (U. S.) 417; *Jeffreys v. Yarborough*, 2 Hawks (N. Car.) 307; *Herrick v. Belknap*, 27 Vt. 673; *Reed v. Jones*, 15 Wis. 40.

⁶¹ *Story v. Livingston*, 13 Pet. (U. S.) 359; *Hatch v. Indianapolis &c.*

R. Co., 9 Fed. 856; 2 *Daniell Ch. Pr.* 936, et seq.; 2 *Beach Mod. Eq. Pr.*, § 695; *Bennett Office Master* 20. See also, *Jewell v. Rock River &c. Co.*, 101 Ill. 57; *Teoli v. Nardolillo*, 23 R. I. 87, 49 Atl. 489.

⁶² See authorities cited in last note, *supra*.

⁶³ *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 40 Fed. 476. See also, *Gay Mfg. Co. v. Camp*, 15 C. C. A. 226, 68 Fed. 67; *Topliff v. Topliff*, 145 (U. S.) 173, 12 Sup. Ct. 825; *McNamara v. Home Land &c. Co.*, 105 Fed. 202; *Troy &c. Factory v. Corning*, 6 Blatchf. (U. S.) 328.

⁶⁴ *Van Ness v. Van Ness*, 32 N. J. Eq. 729; *Fidelity Ins. &c. Co. v. Shenandoah Iron Co.*, 42 Fed. 372; *Hatch v. Indianapolis &c. R. Co.*, 9 Fed. 856. See also, *Jennings v. Dolan*, 29 Fed. 861.

practice, no exceptions to a report can be considered where no objections or exceptions were made or taken before the master, at least where an opportunity was given for such objections by the submission of a draft of his report. "The reason for this rule of practice is that the master might have allowed the objections, and corrected his report, if errors had been pointed out to him; thus saving the parties unnecessary expense, and the court unnecessary trouble."⁶⁵ It is certainly safer to make objections at the first opportunity, and in most jurisdictions where the strict rule is enforced such objections must be made before the master. But there may be objections that could not well be made before him, and an objection is not always required in all jurisdictions as a basis for an exception to his report in some respects at least. Thus, in some of the federal courts, since the United States equity rules went into force, it is held that exceptions, in some instances at least, may be made within one month after the report is filed, even though no objection was made before the master.⁶⁶ So, where the master disobeyed the instructions of the court it was held that no objections on that ground was required to be made before the master,⁶⁷ and exceptions have been allowed where the objection was not made before the master, because of excessable accident, surprise or mistake.⁶⁸ It has been held, however, that where the rule requires the master to submit a draft of his report to counsel and written objections must then be filed, the failure of

⁶⁵ *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 40 Fed. 476; 2 Daniell Ch. Pr. (2d Am. ed.) 1483; *Methodist &c. Church v. Jaques*, 3 Johns. Ch. (N. Y.) 77, 81; *Byington v. Wood*, 1 Paige (N. Y.) 145; *Copeland v. Crane*, 9 Pick. (Mass.) 73; *Story v. Livingston*, 13 Pet. (U. S.) 359; *Gaines v. New Orleans*, 1 Woods (U. S.) 104; *Gordon v. Lewis*, 2 Sumn. (U. S.) 143; *Troy &c. Factory v. Corning*, 6 Blatchf. (U. S.) 328; *Gay Mfg. Co. v. Camp*, 15 C. C. A. 226, 68 Fed. 67; *Gray v. New York Nat. Bldg. Asso.*, 125 Fed. 512; *Whalen v. Stephens*, 193 Ill. 121, 61 N. E. 921; *Marble v. Thomas*, 178 Ill. 540, 53 N. E. 354; *State Bank v. Rose*, 2 Strobb. Eq. (S. Car.) 90; *McKarsie v. Citizens' Bldg. Asso.*, (Tenn. Ch.

App.) 53 S. W. 1007. See also, *Iaeger v. Bossieux*, 15 Gratt. (Va.) 83, 76 Am. Dec. 189; *Lannan v. Clavin*, 3 Kans. 17; *Slee v. Bloom*, 7 Johns. Ch. (N. Y.) 137; *Copeland v. Crane*, 19 Pick. (Mass.) 73; *Winship v. Waterman*, 56 Vt. 181.

⁶⁶ *Jennings v. Dolan*, 29 Fed. 861; *Home Land &c. Co. v. McNamara*, 49 C. C. A. 642, 111 Fed. 822; *Hatch v. Indianapolis &c. R. Co.*, 9 Fed. 856.

⁶⁷ *Clark v. Knox*, 70 Ala. 607, 45 Am. R. 93.

⁶⁸ *Gaines v. New Orleans*, 1 Woods (U. S.) 104, 9 Fed. Cas. No. 5177. See also, *Prince v. Cutler*, 69 Ill. 267; *Mechanics &c. Sav. Asso. v. Farmington Sav. Bank*, 41 Ill. App. 32.

the master to submit such draft of his report does not entitle a party to a consideration of objections not so made, but his remedy is by motion to recommit the report.⁶⁹

§ 3230. Irregularities in proceedings.—Errors appearing on the face of the master's report, when not otherwise reviewable, are usually brought in question by exceptions.⁷⁰ But irregularities in the proceedings of the master or his failing to report as required, are usually brought before the court by motion to recommit or refer the report back, or to set it aside, or the like, and not by exceptions.⁷¹ Thus, such a motion has been held to be the proper remedy for the failure of the master to follow the order of reference,⁷² and for his failure to give a proper notice⁷³ or the like.⁷⁴ The matter is, however, largely regulated by statute or local rules or practice, and, in order to obtain a review of the master's findings, specific exceptions to his report are generally required.

§ 3231. Exceptions to report.—Objections are usually required to be followed up by exceptions to the master's report.⁷⁵ But it is held that errors of law may be suggested on the hearing or motion to confirm.⁷⁶ The time limited for filing exceptions is generally deter-

⁶⁹ *Hillier v. Farrell*, 185 Mass. 434, 70 N. E. 424.

⁷⁰ See, *Rennell v. Kimball*, 5 Allen (Mass.) 356; *Foster v. Goddard*, 1 Black (U. S.) 506, and next following section.

⁷¹ *Suydam v. Dequindre*, Walk. (Mich.) 23; *Douglas v. Merceles*, 24 N. J. Eq. 25; *Tyler v. Simmons*, 6 Paige (N. Y.) 127; *De Mott v. Benson*, 4 Edw. Ch. (N. Y.) 297.

⁷² *United States &c. Co. v. Pitzile*, 66 Ill. App. 475; *Emerson v. Atwater*, 12 Mich. 314; *Miller v. Miller*, 26 N. J. Eq. 423; *Stevenson v. Gregory*, 1 Barb. Ch. (N. Y.) 72; *Arnold v. Blackwell*, 17 N. Car. 1.

⁷³ *Lamson v. Drake*, 105 Mass. 564.

⁷⁴ See, *Ashmead v. Colby*, 26 Conn. 287; *Green v. Brien*, 1 Tenn. Ch. 477.

⁷⁵ *Hillier v. Farrell*, 185 Mass. 434,

70 N. E. 424; *Moore v. Rawson*, 185 Mass. 264, 70 N. E. 64; *Roosa v. Davis*, 175 Mass. 117, 55 N. E. 809; *Sanders v. Dowell*, 7 Sm. & M. (Miss.) 206; *Wilkes v. Rogers*, 6 Johns. Ch. (N. Y.) 566; *Clements v. Pearson*, 4 Ired. Eq. (N. Car.) 257; *Musgrove v. Lusk*, 2 Tenn. Ch. 576; *Wyatt v. Thompson*, 10 W. Va. 645. See also, *Butler &c. Co. v. Georgia &c. R. Co.*, 119 Ga. 959, 47 S. E. 320; *George Green Lumber Co. v. Nutrient Co.*, 113 Ill. App. 635; *McManomy v. Walker*, 63 Ill. App. 259; *Thorne v. Hilliker*, 12 Mich. 215; *Hendrix v. Holden*, 58 S. Car. 495, 36 S. E. 1010; *Greenleaf v. Leach*, 20 Vt. 281; *Harding v. Handy*, 11 Wheat. (U. S.) 103.

⁷⁶ *Williams v. Spitzer*, 203 Ill. 505, 68 N. E. 49; *Von Tobel v. Ostrander*, 153 Ill. 499, 42 N. E. 152; *Fowler v.*

mined by the statute, practice or rule in the particular jurisdiction.⁷⁷ Where there is a re-committal to the master and a second report, it is safer and often necessary to renew the exceptions,⁷⁸ but there are cases in which an exception need not be renewed.⁷⁹ In West Virginia a party may take advantage of an error appearing upon the face of the report without excepting thereto, but unless the error appears upon its face the report will be presumed to be correct, or admitted as correct by the parties, both in regard to the sufficiency of the evidence to support it and in other respects as well.⁸⁰

§ 3232. Form of exceptions.—It has been said that exceptions to a master's report are in the nature of a special demurrer,⁸¹ and it is well settled that they must be specific.⁸² Thus, an exception which does not distinctly point out or designate any particular item or error is generally unavailing.⁸³ So, it has been held that a general objection that evidence is irrelevant and incompetent is not

Payne, 52 Miss. 210; Windon v. Stewart, 48 W. Va. 488, 37 S. E. 603; Gordon v. Lewis, 2 Sumn. (U. S.) 143. See also, Levert v. Redwood, 9 Port. (Ala.) 79; Bogert v. Furman, 10 Paige (N. Y.) 496; Adams v. Claxton, 6 Ves. 226; Adams Eq. (7th Am. ed.) 386.

⁷⁷ See, United States Eq. Rule 83 (giving one month); Gasquet v. Crescent City Brew. Co., 49 Fed. 493; Weber v. Weitling, 18 N. J. Eq. 39; Jones v. White, 112 Ala. 449, 20 So. 527; Wooding v. Bradley, 76 Va. 614; Smith v. Brown, 44 W. Va. 342, 30 S. E. 160; but see, as to waiver of time limit, Jordan, Ex parte, 94 U. S. 248.

⁷⁸ Kee v. Kee, 2 Gratt. (Va.) 116; Findley v. Findley, 42 W. Va. 372, 26 S. E. 433; but compare, Hopkins v. Pritchard, 51 W. Va. 385, 41 S. E. 347.

⁷⁹ See, Moore v. Randolph, 70 Ala. 575; Lippincott v. Bechtold, 54 N. J. Eq. 407, 34 Atl. 1079. See, Bannon v. Overton, 1 Tenn. Ch. 528.

⁸⁰ Bank of Union v. Nickell, (W. Va.) 49 S. E. 1003.

⁸¹ Ridley v. Ridley, 1 Coldw. (Tenn.) 323; Stewart v. Stewart, 40 W. Va. 65, 20 S. E. 862; but see, Foster v. Goddard, 1 Black (U. S.) 506.

⁸² Foster v. Gressett, 29 Ala. 393; Whitworth v. Lowell, 178 Mass. 43, 59 N. E. 760; Crawford v. Osmun, 90 Mich. 77, 51 N. W. 356; Newcomb v. White, 5 N. Mex. 435, 23 Pac. 671; Hoagland v. Saul, (N. J. Eq.) 53 Atl. 704; Rader v. Yeargin, 85 Tenn. 486, 3 S. W. 178; Green v. Lanier, 5 Helsk. (Tenn.) 662; Richie v. Levy, 69 Tex. 133, 6 S. W. 685; Story v. Livingston, 13 Pet. (U. S.) 359; Dexter v. Arnold, 2 Sumn. (U. S.) 108; Sheffield & Co. v. Gordon, 151 U. S. 285, 14 Sup. Ct. 343.

⁸³ Snell v. Deland, 136 Ill. 533, 27 N. E. 707; Hayes v. Hammond, 162 Ill. 133, 44 N. E. 422; Baker v. Mayo, 129 Mass. 517; Neal v. Briggs, 110 Fed. 477; Nickels v. Kane, 82 Va. 309.

sufficiently specific to be entitled to consideration at the hearing.⁸⁴ Regularly, exceptions should be properly entitled in the cause, signed by counsel, and properly show that the party excepts and appeals to the judgment of the court and each exception should usually be separately stated.⁸⁵

§ 3233. Action on exceptions.—"After exceptions have been filed, the next step," says Mr. Adams,⁸⁶ "is that they should be heard and determined by the court, and in doing this there are three courses for adoption. (1) They may be disallowed, or allowed absolutely, which has the effect of at once confirming the report, either as it stands, or with such changes as the allowance of the exceptions may make.⁸⁷ (2) If the facts are imperfectly stated in the report, so that no judgment can be formed as to the proper conclusion; or if the existing evidence is unsatisfactory, but it is possible that other evidence exists, which in consequence of a favorable finding has not been adduced; or if the nature of the matter contested, or the frame of the exceptions, is such that their allowance shows a necessity for further investigation; it may be referred back to the master to review his report, continuing in the meantime the reservation of further directions, and either allowing the exceptions, or making no order thereon. On a reference back to review, the master may receive additional evidence; but if it be accompanied by an allowance of the exceptions, he can come to no conclusion inconsistent with the terms of the exceptions. If no order is made on the exceptions, his finding or reviewal is unfettered.⁸⁸ (3) If the suit has taken such a course, that at the time of hearing the exceptions it is apparent that whatever order be made the same decree will follow, the court may decline to adjudicate on them, and may proceed to decree on further directions, as if no exceptions had been filed."⁸⁹

⁸⁴ *Hamilton v. Southern Nav. & Min. Co.*, 33 Fed. 562.

⁸⁵ See, *Bennett Office Master*, Appendix I, for form. See also, 2 *Daniell Ch. Pr.* (6th ed.) *1316; *Adams Eq.* (8th ed.) *386; 4 *Desty Fed. Proc.* 630.

⁸⁶ *Adams Eq.*, 386, 387.

⁸⁷ See also, *Gottfried v. Crescent Brew. Co.*, 22 Fed. 433; *White v. Hampton*, 10 *Iowa* 238; *Clark v. Willoughby*, 1 *Barb. Ch.* (N. Y.) 68.

⁸⁸ *Egerton v. Jones*, 1 *Russ. & M.* 694; *Twyford v. Trail*, 3 *M. & C.* 645; *Livesey v. Livesey*, 10 *Sim.* 331; *Grant, In re*, 10 *Sim.* 573; *Ballard v. White*, 2 *Hare* 158; *Stocken v. Dawson*, 2 *Phil.* 141. See also, *Mitchell v. McKinny*, 6 *Heisk. (Tenn.)* 83; *Harris v. Ferris*, 18 *Fla.* 84; *Van Ness v. Van Ness*, 32 *N. J. Eq.* 729.

⁸⁹ *Hall v. Laver*, 1 *Hare* 571; *Robinson v. Milner*, 1 *Hare* 578,

§ 3234. **Recommittal—Re-reference.**—The matter of recommitting the report to the master for correction or of referring the case again to the same or another master is largely within the discretion of the court, and the court will not, ordinarily, grant a motion to recommit without some good reason being shown or appearing.⁹⁰ Nor will it be granted, under ordinary circumstances, at the instance of a party whose own neglect has created the only occasion or reason for so doing.⁹¹ Thus, where, upon a reference to ascertain the damages for infringement of a patent, the complainant introduced before the master testimony given by the defendant in another suit as to the profits made by him by the use of the infringing machines, and the defendant's counsel made no effort to correct such testimony, but relied wholly on his exception to the master's report on the ground that the testimony was incompetent, it was held that, after the court had overruled such exception, it would not reopen the hearing before the master to permit the defendant to show that his testimony in the previous suit was inaccurate.⁹² But there are cases in which the power to remand has been exercised in order to reach the merits and do justice, even though the necessity may have arisen to some extent from the carelessness or ignorance of counsel,⁹³ and the courts often exercise their discretion by recommitting where the introduction of further evidence seems necessary.⁹⁴ So, of course, where the court finds that the master has failed to find on all the necessary material facts required by the submission,⁹⁵ or has otherwise com-

note; *Courtenay v. Williams*, 3 Hare 539, 554.

⁹⁰ *Henderson v. Foster*, 182 Mass. 447, 65 N. E. 810; *Mosher v. Joyce*, 2 C. C. A. 322, 51 Fed. 441, 444; *Hubbard v. Camperdown Mills*, 26 S. Car. 581.

⁹¹ *Central Trust Co. v. Georgia Pac. R. Co.*, 83 Fed. 386; *Reading Ins. Co. v. Egelhoff*, 115 Fed. 393; *Gould v. Elgin City Banking Co.*, 136 Ill. 60, 26 N. E. 497; *Slaughter v. Slaughter*, 8 B. Mon. (Ky.) 482; *Sowles v. Sartwell*, (Vt.) 56 Atl. 282. See also, *Lemon v. Rogge*, (Miss.) 11 So. 470; *Nece v. Pruden*, 8 Phila. (Pa.) 350; *Vandermark's Estate*, 2 Luz. Leg. Reg. (Pa.) 83.

⁹² *Cimlotti & Co. v. Bowsky*, 113 Fed. 699.

⁹³ See, *Beard v. Green*, 51 Miss. 856.

⁹⁴ *Beard v. Green*, 51 Miss. 856; *Asp v. Warren*, 108 Mass. 587; *Nunn v. Nunn*, 66 Ala. 35; *Fuller v. Fuller*, 23 Fla. 236, 2 So. 426; *Worthington v. Hiss*, 70 Md. 172, 16 Atl. 537, 17 Atl. 1026; *Thomas v. Dawson*, 9 Gratt. (Va.) 531; *Waterman v. Buck*, 63 Vt. 544, 22 Atl. 15; *Williams v. Clark*, 93 Va. 690, 25 S. E. 1013.

⁹⁵ *Bolware v. Bolware*, 4 Litt. (Ky.) 256; *Forest Hill & Co. Asso. v. McEvoy*, 24 Ky. L. R. 161, 66 S. W. 1031; *Dutch Church v. Smock*, 1 N.

mitted an error that is material,⁹⁸ the court may recommit. But, as will be shown in the next section, the court may generally take up the matter and make its own findings, or correct small errors, without recommitting the report, and will generally refuse to recommit when no good could be accomplished by a recommitment.⁹⁷ It has been held that the court may receive evidence of extrinsic facts upon application to recommit.⁹⁸ It has also been held that notice to parties is unnecessary on a recommitment to correct a report where no evidence is to be taken.⁹⁹ A recommitment for a particular purpose does not, ordinarily, open up the whole case, and the master should confine himself within the limitations of the order of recommitment.¹⁰⁰

§ 3235. Correction of report—Confirmation.—As already intimated, the court may, in many instances at least, correct the master's report without recommitting it.¹⁰¹ Indeed, the court may make additional and supplemental findings based upon the evidence.¹⁰² A report may also be confirmed in part and recommitted in part.¹⁰³ Unless otherwise provided by statute or determined by the practice in the particular jurisdiction, the general rule is that any report

J. Eq. 148; *Jones v. Byrne*, 94 Va. 751, 27 S. E. 591; *King v. Burdett*, 44 W. Va. 561, 29 S. E. 1010.

⁹⁷ *Brokaw v. McDougall*, 20 Fla. 212; *Brueggstradt v. Ludwig*, 184 Ill. 24, 56 N. E. 419; *Laswell v. Robbins*, 39 Ill. 209, 219; *Carman v. Hurd*, 1 Pinn. (Wis.) 619.

⁹⁸ See, *Taylor v. Robertson*, 27 Fed. 537; *Jennings v. Dolan*, 29 Fed. 861; *McElroy v. Swope*, 47 Fed. 380; *Cawley v. Cawley*, 181 Mass. 451, 63 N. E. 1070.

⁹⁹ *Peck v. Metcalf*, 8 R. I. 386.

¹⁰⁰ *Prince v. Cutler*, 69 Ill. 267.

¹⁰¹ *Harris v. Ferris*, 18 Fla. 84; *Emig, In re*, 186 Pa. St. 409, 40 Atl. 522. See also, *Clark v. Willoughby*, 1 Barb. Ch. (N. Y.) 68. See generally as to scope of re-reference, 2 Beach Mod. Eq. Pr., § 715, and compare, *Van Ness v. Van Ness*, 32 N. J. Eq. 729; *Pinneo v. Goodspeed*, 120 Ill. 524, 12 N. E. 196.

¹⁰¹ *Huston v. Cassidy*, 14 N. J. Eq. 320; *Utica Ins. Co. v. Lynch*, 2 Barb. Ch. (N. Y.) 573; *Crossman v. Card*, 143 Mass. 152, 9 N. E. 514; *American &c. Co. v. Pollard*, 132 Ala. 155, 32 So. 630; *Gaines v. Bockerhoff*, 136 Pa. St. 175, 19 Atl. 958; *Richie v. Levy*, 69 Tex. 133, 6 S. W. 685; but see, *Miller v. People's Lumber Co.*, 98 Ill. App. 468; *Poling v. Huffman*, 48 W. Va. 639, 37 S. E. 526.

¹⁰² *Henderson v. Harness*, 184 Ill. 520, 56 N. E. 786; *Johnson v. Gallagos*, 10 N. Mex. 1, 60 Pac. 71. See also, *Barnum v. Barnum*, 42 Md. 251; *Callender v. Colegrove*, 17 Conn. 1; *Witters v. Sowles*, 43 Fed. 405; *Carpenter v. Schermerhorn*, 2 Barb. Ch. (N. Y.) 314; 2 Beach Mod. Eq. Pr., § 712.

¹⁰³ *Callender v. Colgrove*, 17 Conn. 1. See also, *Mitchell v. McKinny*, 6 Helsk. (Tenn.) 83.

to which exceptions might be taken must be confirmed before it can be finally acted upon.¹⁰⁴ The rule is stated by Mr. Beach as follows: "Wherever the discretion of the court is exercised upon the first order, and where the master is only called upon to perform some act or make some inquiry necessary for carrying out the order which the court has made, the report of the master will not require confirmation. But where the report is required for the purpose of enabling the court to make some discretionary order or decree, whether the order directing the reference be made upon a decree or upon any interlocutory application, the report requires confirmation before it is adopted as the foundation of such future order or decree."¹⁰⁵ Under the old practice a rule nisi was entered that the report should stand confirmed unless cause to the contrary should be shown within eight days. A similar practice obtains in some jurisdictions in this country, and in others the general equity rules provide that the report shall stand confirmed unless exceptions are taken within the time designated by such rules.¹⁰⁶ The order of confirmation is interlocutory rather than a final adjudication,¹⁰⁷ and it has been held that a confirmation may be implied in some instances without any express order directly confirming the report.¹⁰⁸ It has also been held that the master's report is not usually evidence until after confirmation,¹⁰⁹ but is admissible as such after exceptions have been overruled.¹¹⁰

§ 3236. Weight to be given master's finding.—It is well settled in most jurisdictions that the report of the master is not necessarily conclusive as to the facts found by him but may be reviewed by the

¹⁰⁴ *Dorsey v. Hammond*, 1 Bland (Md.) 463; *Champlin v. Memphis &c. R. Co.*, 9 Helsk. (Tenn.) 683; *Scott v. Livesey*, 2 Sim. & St. 300, 1 Eng. Ch. 300; 16 Cyc. 459.

¹⁰⁵ 2 Beach Mod. Eq. Pr., § 699; 2 Daniell Ch. Pr. (5th ed.), §§ 1304, 1305.

¹⁰⁶ See, 2 Beach Mod. Eq. Pr., § 699; 16 Cyc. 459.

¹⁰⁷ *Rust v. Mobile &c. Co.*, 124 Ala. 202, 27 So. 263; *Adkisson v. Dent*, 11 Ky. L. R. 85, 11 S. W. 950; *Nash v. Hunt*, 116 Mass. 237; *Carter v. Privatt*, 3 Jones Eq. (N. Car.) 345;

First Nat. Bank v. Simms, 49 W. Va. 442, 38 S. E. 525.

¹⁰⁸ *Johnson v. Meyer*, 54 Ark. 437, 16 S. W. 121; *White v. Hampton*, 10 Iowa 238; *Portoues v. Holmes*, 33 Ill. App. 312; but compare, *Anderson v. Henderson*, 124 Ill. 164, 16 N. E. 232.

¹⁰⁹ *Diffenderffer v. Winder*, 3 Gill & J. (Md.) 311; *San Antonio &c. R. Co. v. Ryan*, (Tex. Civ. App.) 47 S. W. 749.

¹¹⁰ *Richie v. Levy*, 69 Tex. 133, 6 S. W. 685; *Whitehead v. Perle*, 15 Tex. 7.

court.¹¹¹ Further than this, however, it is difficult to state any precise general rule, for the authorities are somewhat conflicting as to just what weight should be given to the master's finding. It is frequently said that it should be given the same weight as the verdict of a jury,¹¹² but in some jurisdictions this doctrine is expressly repudiated,¹¹³ and in many of them it is said that the finding of the master, at least where the evidence is reported, is merely advisory.¹¹⁴ Yet the finding of the master is presumed to be correct and when on conflicting evidence, will rarely be disturbed unless it is very clearly incorrect, especially where the reference is by consent.¹¹⁵ It is said, however, that while the presumption in the trial court should be that the finding of the master is correct, if the trial court adjudges it erroneous the presumption goes down.¹¹⁶ On exceptions to the master's report, if the evidence is not before the trial court, the

¹¹¹ *Field v. Holland*, 6 Cranch (U. S.) 8; *Ennesser v. Hudek*, 169 Ill. 494, 48 N. E. 673; *Brammerman v. Jennings*, 101 Ind. 253; *Honore v. Colmesnil*, 1 J. J. Marsh. (Ky.) 506; *Near v. Lowe*, 56 Mich. 632, 23 N. W. 448; *Burhans v. Van Zandt*, 7 Barb. (N. Y.) 91; *McMillan v. McNeill*, 69 N. Car. 129; *Phillip's Appeal*, 68 Pa. St. 130; *Thorpe v. Thorpe*, 12 S. Car. 154; *Crislip v. Cain*, 19 W. Va. 438; but see, under Vermont statute, *Hathaway v. Hagan*, 64 Vt. 135, 24 Atl. 131; *Waterman v. Buck*, 58 Vt. 519.

¹¹² *Vaughan v. Smith*, 69 Ala. 92; *Cary v. Herrin*, 62 Me. 16; *Field v. Romero*, 7 N. Mex. 630, 41 Pac. 517; *Perry v. Sullivan & Co.*, 6 S. Car. 310. See also, *Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237; *Haymond v. Camden*, 48 W. Va. 463, 37 S. E. 642; *Newell v. West*, 149 Mass. 520, 21 N. E. 954; *Stannard v. Sperry*, 56 Conn. 541.

¹¹³ See, *Holmes v. Holmes*, 18 N. J. Eq. 141; *Stewart v. Stewart*, 40 W. Va. 65, 20 S. E. 862; but compare, *Haulenbeck v. Cronkright*, 23 N. J. Eq. 407.

¹¹⁴ *Boesch v. Graff*, 133 U. S. 697, 10 Sup. Ct. 378, 381; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355; *Ennesser v. Hudek*, 169 Ill. 494, 48 N. E. 673; *Brammerman v. Jennings*, 101 Ind. 253; *Medler v. Albuquerque Hotel & Co.*, 6 N. Mex. 331, 28 Pac. 551; *McMillan v. McNeill*, 69 N. Car. 129; *Shipman v. Fletcher*, 91 Va. 473, 22 S. E. 458. See also, *Calvert v. Nickles*, 26 S. Car. 304, 2 S. E. 116; *Wheeler v. Alderman*, 34 S. Car. 533, 13 S. E. 673.

¹¹⁵ *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894; *Girard & Co. v. Cooper*, 162 U. S. 529, 16 Sup. Ct. 879; *Camden v. Stuart*, 144 U. S. 104, 12 Sup. Ct. 585; *Ward v. Abbeville*, 130 Ala. 597, 30 So. 341; *Brueggestratt v. Ludwig*, 184 Ill. 24, 56 N. E. 419; *Williams v. Lindblom*, 163 Ill. 346, 45 N. E. 245; *Pray v. Brigham*, 174 Mass. 129, 54 N. E. 338; *Gentile v. Kennedy*, 8 N. Mex. 347, 45 Pac. 879; *Felton v. Felton*, 47 W. Va. 27, 34 S. E. 753; 2 Beach Mod. Eq. Pr., § 711.

¹¹⁶ *Brammerman v. Jennings*, 101 Ind. 253, 256, citing *McKinney v. Pierce*, 5 Ind. 422.

findings of fact by the master will be taken by that court as true.¹¹⁷ And it is held in some jurisdictions that the findings of a referee or master are entitled to the same credit in the trial court as the findings of the trial court, in a case tried by such court, are entitled to on appeal.¹¹⁸

¹¹⁷ *Atlas Nat. Bank v. Abram* 117, 80 N. W. 1107, citing other Wisconsin decisions.
French Sons Co., 134 Fed. 746.

¹¹⁸ *Zoesch v. Thielman*, 105 Wis.

EVIDENCE IN ADMIRALTY CASES.

CHAPTER CLVIII.

ADMIRALTY JURISDICTION.

Sec.	Sec.
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3238. Origin and history — “Admiral.”	3244. Admiralty law—Administered in the United States.
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§ 3237. **Generally.**—Admiralty jurisdiction was originally founded on the theory that the ships of any country were considered as a part of its territory. This accounts, too, for the history of the national strife in obtaining or holding control of the seas and excuses the ambition and pride of civilized and commercial countries in their navies and merchant marine. While it was the object of every country to encourage navigation and maritime commerce, it was also the desire of all commercial countries to protect and regulate their ships and seamen. Hence, admiralty jurisdiction grew out of the common respect of the rights of navigation as first administered by the arbitrary power of the admiral—or as settled by crude arbitration in cases of conflict of authority.¹

§ 3238. **Origin and history—“Admiral.”**—Before admiralty courts were known or organized the jurisdiction of the sea, so far as any particular nation was concerned, was administered by a great naval officer holding his office and authority directly from the sovereign, but by reason of his peculiar situation he was clothed with many of the prerogatives of sovereignty. Many nations having consider-

¹ 3 Kent Comm. 2; Zouch's Juris- Bro. Civil & Adm. Law, chap. 2; diction of Admiralty—Ass. 1. 2 Benedict Adm. Pr., § 2.

able maritime commerce had some high or supreme officer bearing a title resembling in a greater or less degree the English word admiral. So that admiralty jurisdiction in its primitive form was little else than the exercise of the power of the admiral. It must be conceded that the fierce rule of an uncouth navigator was not tempered with either the mercy or justice now administered in these courts. The due administration of the law of the high seas has gradually passed into the functions of properly constituted courts while the high officer, still known as the admiral, is now limited in his authority to the general direction of the fleet or the less pretentious control of his individual vessel. His quondam power and greatness are seen alope in the splendid system of laws which bears his name. "The mild and equitable system of admiralty law derives its descent through a long line of modifications and meliorations, from the absolute and irresponsible rule of naval command, as the peaceful law of real estate and the common law generally, have descended from the iron despotism of military dominion carried to its perfection in the feudal system."²

§ 3239. **Nature of.**—The very best reasons exist for lodging the admiralty jurisdiction within the highest powers of the general government. It is through the medium of navigation that nations come in contact with each other upon the universal highway—the open sea. The vessels of a nation must be under its supreme control and any wrong inflicted by them upon a citizen of another country must be punished and any injuries sustained by them at the hands of seamen or citizens of another country must be vindicated. In order to encourage commerce and navigation and to secure peace among nations they must control their ships and regulate commerce on the seas. Mr. Justice Story states this principle thus: "The admiralty jurisdiction naturally connects itself on the one hand, with our diplomatic relations to the duties to foreign nations and their subjects, and, on the other hand, with the great interest of navigation and commerce, foreign and domestic. There is, then, a peculiar wisdom in giving to the national government a jurisdiction of this sort which cannot be yielded, except for the general good and which multiplies the securities for public peace abroad, and gives to commerce and navigation the most encouraging support at home."³

¹ Benedict Adm. Pr., §§ 3, 4; Hall
Adm. Intro. 7, 8.

² 2 Story Comm. on Const., § 1672;
Moses Taylor, The, 4 Wall. (U. S.)
411.

§ 3240. **Admiralty jurisdiction—United States rule.**—Admiralty jurisdiction was conferred upon the federal courts by the constitution. But by its express terms the judicial power was extended to all cases of admiralty and maritime jurisdiction. This has been held to mean all such cases of a maritime character as fell within the admiralty courts of the states at the time of the adoption of the constitution.⁴ There is a distinction between the admiralty jurisdiction as exercised by the federal courts and the English courts of admiralty, as well as that exercised by the continental courts, which were organized under and governed by the principles of the civil law.⁵ The American rule on this subject has been stated by the United States Supreme Court as follows: “Principal subjects of admiralty jurisdictions are maritime contracts and maritime torts, including captures *jure belli*, and seizures on water for municipal and revenue forfeitures. (1) Contracts, claims, or service purely maritime and touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty. (2) Torts or injuries committed on navigable waters, of a civil nature, are also cognizable in the admiralty courts. Jurisdiction in the former case depends upon the nature of the contract, but in the latter it depends entirely upon locality. Mistakes need not be made if these rules are observed; but contracts to be performed on waters not navigable, are not maritime any more than those made to be performed on land. Nor are torts cognizable in the admiralty unless committed on the waters within the admiralty and maritime jurisdiction, as defined by law. Such jurisdiction, whether of torts or of contracts, was, and still is, restricted in the parent country to tide-waters, as they have no large fresh-water lakes or fresh-water rivers which are navigable. Waters where the tide did not ebb and flow, were regarded in that country as not within the admiralty and maritime jurisdiction. Attempt was subsequently made to restrict the jurisdiction of the admiralty courts in torts to cases arising on the high seas. But this court held that it extended to all waters within the ebb and flow of the tide, though *infra corpus comitatus*, and as far up the rivers emptying into the sea or bays and arms of the sea, as the tide ebbed and flowed.”⁶

⁴ *Waring v. Clarke*, 5 How. (U. S.) 574, 579; *Thomas Jefferson*, S.) 441, 454.

⁵ *Bags of Linseed*, 1 Black (U. S.) 108. *ance Co. v. Dunham*, 11 Wall. (U. S.) 1; *Propeller Genesee Chief v. Fitzhugh*, 12 How. (U. S.) 443; *Easton, Ex parte*, 95 U. S. 68, 72; *Maury*

⁶ *Belfast, The*, 7 Wall. (U. S.) 624, 637; *Commerce, The*, 1 Black

§ 3241. **Admiralty law follows civil law.**—The “law of the sea” naturally grew as maritime commerce extended and the sea was necessarily considered the common highway of nations, in which, for the purpose of business, all nations were considered equal and their rights finally guaranteed in a system of rules enforced by the courts of the different nations. Hence, these laws naturally became impressed with the characteristics of the laws of the countries wherein they were first administered. A modern writer has expressed this principle thus: “The countries that earliest reduced the law of the sea to a system, and adopted codes of maritime regulations, having been countries in which the Roman or civil law prevailed, the principles of that great system of jurisprudence were incorporated with, and gave character to, the maritime law: and so much were pure reason, abstract right, and practical justice mingled in that system, and so important was it that the general maritime law should be uniform and universal, that, in England, where the common law was the law of the land, the civil law was held to be the law of the admiralty and the course of proceedings in admiralty closely resembled the civil law practice.”⁷

§ 3242. **Admiralty jurisdiction—Controlled by maritime laws.** A court of admiralty is a court of the law of nations, and in one branch of its jurisdiction, that of prize, both the law and jurisdiction are derived solely from the laws of nations, and on the instance side of the court, in many cases, as when the controversy is between parties of different nations, its rule of the case or the jurisdiction of the court is not always to be taken from the municipal law of either of the parties, but from the general maritime law which governs all on the common highway of nations.⁸ The jurisdiction of the District Courts under the 9th section of the judiciary act of 1789 has been held to embrace all cases of a maritime nature, whether of an admiralty cognizance or not. This jurisdiction and the law regulating its exercise “are to be sought for in the general maritime law of

v. Culliford, 10 Fed. 388; Enright, The, 12 Fed. 157; Delovio v. Bolt, 2 Gall. (U. S.) 398, 7 Fed. Cas. No. 3776; Richard Winslow, The, 71 Fed. 426; Josephine, In re, 39 N. Y. 19; Warren v. Kelley, 80 Me. 512, 15 Atl. 49.

⁷ Benedict Adm. Pr., § 5; United

States v. New Bedford Bridge, 1 Woodb. & M. (U. S.) 401, 460, 27 Fed. Cas. No. 15867; Clarke v. New Jersey &c. Co., 1 Story (U. S.) 531. ⁸ Huntress, The, 2 Ware (U. S.) 89, 106; DeLovio v. Bolt, 2 Gall. (U. S.) 398, 7 Fed. Cas. No. 3776.

nations, and are not confined to that of England, or any other particular maritime nation.”⁹

§ 3243. **Jurisdiction must appear—Effect of tide.**—It must appear on the face of the proceedings that the court of admiralty had jurisdiction of the case. But this jurisdiction is sometimes a question of fact. The proper practice seems to be to set up the want of jurisdiction as a defense, or in the nature of a plea in abatement and have the question determined on the proof introduced on the issue raised by such a plea. The question of jurisdiction in cases where materials have been furnished or repairs made on a vessel depends generally on its location or position at the time such materials were furnished or such repairs were made. In order to give jurisdiction to the admiralty court the proof must show whether the vessel at the time was at a place where the tide ebbs and flows. As admiralty jurisdiction depends upon location and is determined by the ebb and flow of the tide, if the tide has any influence at all it must determine the question.¹⁰

§ 3244. **Admiralty law—Administered in the United States.**—The statutory regulations of maritime laws are far from exclusive in the United States. It has been the constant aim of the courts of this country to apply the general maritime law of the world when it could be done without infringing or violating the statutory law and the usages of this country. At the same time the courts of this country have not imported any modern codes into this system. Nor have the courts of this country been bound by the petty jealousies of common courts of England to the extent of unnecessarily restricting the law of the admiralty. This principle of the growth of admiralty jurisprudence and the application of maritime law by the courts of this country was thus stated in a comparatively recent case. “Whenever the Supreme Court has applied the general maritime law to cases arising before them, it will be observed that they have limited themselves to that. The growth of admiralty jurisprudence within this country has been in the direction of the freedom from the confined limits within which, owing to the well-known jealousy of the courts of common law in England, the law of the admiralty was in that

⁹ *Seneca, The*, 3 Wall. Jr. (U. S.) 395; *Lottawanna, The*, 21 Wall. (U. S.) 558; *St. Lawrence, The*, 1 Black (U. S.) 522, 526. ¹⁰ *Planter, The*, 7 Pet. (U. S.) 324; *Rex v. Smith*, 2 Dong. 441.

country restricted. But, while our admiralty law has expanded and developed, and this by the application of the general maritime law, our Supreme Court has carefully kept it within the boundaries of the law and usages of this country and has not imported the modern codes into our system.”¹¹

§ 3245. Influence of constitution and statute on the admiralty laws.—On the question of the influence of the constitution and statutory enactments on the maritime law, the Supreme Court say: “As the constitution extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction, and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature, and not in the state legislatures. It is true, we have held that the boundaries and limits of the admiralty and maritime jurisdiction are matters of judicial cognizance, and cannot be affected or controlled by legislation, whether state or national. But within these boundaries and limits the law itself is that which has always been received as maritime law in this country, with such amendments and modifications as congress may from time to time have adopted.”¹²

§ 3246. High seas—Meaning.—The jurisdiction of local courts in a certain class of cases depends on whether the vessel seized, or the

¹¹ *Butler v. Boston &c. Co.*, 130 U. S. 527, 9 Sup. Ct. 612; *American Ins. Co. v. Canter*, 1 Pet. (U. S.) 511; *Waring v. Clarke*, 5 Tow. (U. S.) 441; *Lottawanna, The*, 21 Wall. (U. S.) 558; *Steele v. Thacher*, 1 Ware (U. S.) 91; *Scotland, The*, 105 U. S. 24. To this point the court cited the following cases: *General Smith, The*, 4 Wheat. (U. S.) 438; *St. Jago de Cuba, The*, 9 Wheat. (U. S.) 409; *United States v. La Vengeance*, 3 Dall. (U. S.) 297; *United States v. Sally, The*, 2 Cranch (U. S.) 406; *United States v. Betsey, The*, 4 Cranch (U. S.) 443; *Samuel, The*, 1 Wheat. (U. S.) 9; *Octavia, The*, 1 Wheat. (U. S.) 20; *Hobart v. Drogan*, 10 Pet. (U. S.) 108; *New Jersey &c. Co. v. Merchants' Bank*,

6 How. (U. S.) 344; *Rich v. Lambert*, 12 How. (U. S.) 347; *Genesee Chief v. Fitzhugh*, 12 How. (U. S.) 443; *Ward v. Peck*, 18 How. (U. S.) 267; *Dupont de Nemours v. Vance*, 19 How. (U. S.) 162; *China, The*, 7 Wall. (U. S.) 53; *Merrimac, The*, 14 Wall. (U. S.) 199; *Sherlock v. Alling*, 93 U. S. 99; *Scotia, The*, 14 Wall. (U. S.) 170; *Alabama, The*, 92 U. S. 695; *Atlas, The*, 93 U. S. 302; *Virginia Ehrman, The*, 97 U. S. 309; *North Star, The*, 106 U. S. 17, 1 Sup. Ct. 41.

¹² *Butler v. Boston &c. Co.*, 130 U. S. 527, 9 Sup. Ct. 612; *St. Lawrence, The*, 1 Black (U. S.) 522, 526; *Lottawanna, The*, 21 Wall. (U. S.) 558.

collision or other wrong which is the subject of the action, was upon the "high seas" or within a particular port. Hence, the exercise of jurisdiction in such cases depends upon the proof, and it therefore becomes important to know the meaning of "high seas." A general definition for this term is "all waters below the line of low water mark on the sea coast are comprehended within that description and when the tide flows the waters to high water mark also are properly the high seas."¹³ Lord Hale says of it, "that part of the sea which lies not within the body of a country is called the main sea or ocean." The court that quoted Lord Hale further said: "The open sea, the high sea, the ocean, is that which is the common domain, within the body of no country and under the particular right or jurisdiction of no sovereign, but open, free, and common to all alike, as a common and equal right. The expression describes the open ocean where the dominion of the winds and waves prevails without check or control."¹⁴ So it has been held that a vessel lying outside of the bar of an harbor of the United States, within three miles of the shore, is on the high seas.¹⁵ In its ordinary acceptance the term is held to mean the seas outside low water mark on the coast.¹⁶ And it has been held that the waters of havens where the tide ebbs and flows are not properly the high seas, unless they are without low water mark.¹⁷ And the term is held to include waters on the sea coast outside of the

¹³ *Abby, The*, 1 Mason (U. S.) 360, 1 Fed. Cas. No. 14; *De Lovio v. Boit*, 2 Gall. (U. S.) 398, 7 Fed. Cas. No. 3776; *Gedney v. L'Amistad*, 10 Fed. Cas. No. 5294a; *Harriet, The*, 1 Story (U. S.) 251, 11 Fed. Cas. No. 6099; *United States v. Grush*, 5 Mason (U. S.) 290, 26 Fed. Cas. No. 15268, 1 U. S. Law Int. 214; *United States v. Morel*, 26 Fed. Cas. No. 15807, 13 Am. Jur. 279; *United States v. Seagrist*, 4 Blatchf. (U. S.) 420, 27 Fed. Cas. No. 16245; *United States v. Bevans*, 3 Wheat. (U. S.) 336; *United States v. Furlong*, 5 Wheat. (U. S.) 184; *United States v. Coombs*, 12 Pet. (U. S.) 72; *Waring v. Clarke*, 5 How. (U. S.) 441; *United States v. Rodgers*, 150 U. S. 249, 14 Sup. Ct. 109; *Manley v.*

People, 7 N. Y. 295; *Constable's Case*, 5 Coke 106.

¹⁴ *United States v. Morel*, 26 Fed. Cas. No. 15807, 13 Am. Jur. 279; *United States v. Hamilton*, 1 Mason (U. S.) 152, 26 Fed. Cas. No. 15290; *United States v. Wiltberger*, 3 Wash. (U. S.) 515, 27 Fed. Cas. No. 16738.

¹⁵ *United States v. Smith*, 1 Mason (U. S.) 147, 27 Fed. Cas. No. 16337; *United States v. New Bedford Bridge*, 1 Woodb. & M. (U. S.) 401, 27 Fed. Cas. No. 15867, 10 Law R. 127.

¹⁶ *United States v. Seagrist*, 4 Blatchf. (U. S.) 420, 27 Fed. Cas. No. 16245.

¹⁷ *United States v. Hamilton*, 1 Mason (U. S.) 152, 26 Fed. Cas. No. 15290.

boundaries of low water mark.¹⁸ It has been held that the term does not include the combined salt and fresh waters which at high tide flood the banks of an adjacent bay.¹⁹ It has also been held to mean the open ocean as distinguished from a river, haven, basin or bay.²⁰ Mr. Benedict gives the following definition: "The high sea, the open sea, are phrases used to distinguish the expanse and mass of any great body of water, from its margin or coast, its harbors, bays, creeks, inlets. High seas, in the plural number, more properly mean the oceanic mass of waters, which is composed of many subdivisions of seas and oceans."²¹

§ 3247. **High seas—Great lakes.**—The peculiar phraseology of the United States statutes has given rise to some controversy in regard to the admiralty jurisdiction over the Great Lakes. The jurisdiction conferred by the statutes extends not only to the high seas, but to any arm of the sea, or in any river, haven, creek, basin or bay within the admiralty jurisdiction of the United States and out of the jurisdiction of any particular state. In discussing the question of admiralty jurisdiction over the Great Lakes the Supreme Court of the United States said: "These lakes are in truth, inland seas. Different states border on them on one side and a foreign nation on the other. A great and growing commerce is carried on upon them between different states and a foreign nation which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have been encountered on them, and prizes been made, and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas applies with equal force to the lakes. There is an equal necessity for the instance and for the prize power of the admiralty court to administer international law, and if the one cannot be established, neither can the other."²² In a later case the same court expressly held that the term "high seas" was applicable to the open, unenclosed waters of the Great Lakes.²³ But in cases originating where the vessel was in any

¹⁸ *Ross, In re*, 140 U. S. 453, 11 Sup. Ct. 897; *Byers, Ex parte*, 32 Fed. 404; *United States v. Ross*, 1 Gall. (U. S.) 624, 27 Fed. Cas. No. 16196.

¹⁹ *Morgan v. Nagodish*, 40 La. An. 246, 3 So. 636.

²⁰ *Emory v. Collings*, 1 Harr. (Del.) 325.

²¹ *Benedict Adm. Pr.*, § 224.

²² *Genesee Chief, The*, 12 How. (U. S.) 443, 453; *Illinois &c. R. Co. v. Illinois*, 146 U. S. 387, 435, 13 Sup. Ct. 110. See, *Eagle, The*, 8 Wall. (U. S.) 15.

²³ *United States v. Rodgers*, 150 U. S. 249, 14 Sup. Ct. 109.

arm of the sea, or any river, haven, creek, basin or bay, in order to confer jurisdiction on admiralty courts the proof must show that such vessel, at the time of the alleged offense, was outside of the jurisdiction of any state; hence, the admiralty jurisdiction was held to extend to offenses committed "on a vessel belonging to a citizen of the United States, when such vessel is in the Detroit River, out of the jurisdiction of any particular state, and within the territorial limits of the Dominion of Canada."²⁴ But under a later statute it has been held that the admiralty jurisdiction of one district court of the United States did not extend to offenses committed on a vessel on one of the Great Lakes within the jurisdiction of another district court.²⁵

²⁴ *United States v. Rodgers*, 150 U. S. 249, 14 Sup. Ct. 109; *Robert Holland, The*, 59 Fed. 200; *North Star, The*, 10 C. C. A. 262, 62 Fed. 71; *Bigelow v. Nickerson*, 17 C. C. A. 1, 70 Fed. 113. A contrary holding was made in an earlier case in the district court for the Eastern District of Michigan. *Byers, Ex parte*, 32 Fed. 404; *Henry Miller's Case*, 1 Bro. Adm. 156. See, *People v. Tyler*, 7 Mich. 161.

²⁵ *United States v. Peterson*, 64 Fed. 145.

CHAPTER CLIX.

ADMIRALTY PRACTICE.

Sec.	Sec.
3248. Nature—Generally.	3254. Proceedings yield to circumstances.
3249. Nature of admiralty cases.	3255. Proceedings not included in statutes unless expressly named.
3250. Courts of admiralty resemble courts of equity.	3256. Evidence of usage—Sailing rules.
3251. Equitable principles applied in cases of negligence.	3257. Judicial notice.
3252. Flexibility of admiralty courts—Admissibility of evidence.	3258. Foreign laws—When proof required.
3253. Liberal rules of evidence.	

§ 3248. **Nature—Generally.**—From the very nature of the case admiralty courts are not creatures of statutes. They have become in America, to some extent, subject to statutory control but the law is administered in much the original and universal way. While it followed the civil law in its origin and general characteristics and has felt the touch of the common law, it is of necessity in the nature of equity. It could scarcely exist, much less grow were it administered according to the strict rules of statutory regulation. The universal respect it has gained and its general application in all civilized countries are due to the peaceful and equitable principles applied in controversies arising between persons of different nationality and citizens of different countries. On the nature of admiralty practice Mr. George Ticknor Curtis said: "The Admiralty should be otherwise known than as a court of curious learning, where controversies are determined upon principles and under forms which, to the popular feelings, are unusual, abstruse, or difficult of apprehension. Its process and forms are indeed in many respects different from the common law, the administration of which is most generally familiar to the people of the United States. But one of its main and most characteristic features is that it is, to the extent of its jurisdiction, a court of equity. It entertains pleas of part performance, and decreed an instrument to be good in part and bad in part,

as the fact and equity of the case may be. It annuls positive contracts improvidently entered into by its "ward," the seaman, and is not restrained from his protection by the binding sanctity of a seal. It rejects altogether in its pleadings the technical niceties of the common law, and requires only that the substantial merits should be set forth, in forms that are peculiar, indeed, but wholly liberal and unembarrassing. In the construction of contracts it seeks to combine the intention of the parties and actual justice in the result of their controversies."¹

§ 3249. Nature of admiralty cases.—Civil actions in admiralty are in the nature of proceedings in rem. In such actions there is seldom a personal defendant. The advantage, if not the necessity of the nature of such proceedings is found in the fact that a valid title against all the world is transferred to the purchaser at a sale under a decree or order of the admiralty court. This principle has been distinctly recognized by the United States Supreme Court thus: "The distinguishing and characteristic feature of such suit is that the vessel or thing proceeded against is itself seized and impleaded as the defendant, and is judged and sentenced accordingly. It is this dominion of the suit in admiralty over the vessel or thing itself which gives to the title made under its decrees validity against all the world."²

§ 3250. Courts of admiralty resemble courts of equity.—It may be stated as a general proposition that the rules of admiralty in a general way resemble those of other courts. The same could be said of courts of law and courts of equity. But in many respects courts of law and courts of equity differ, and in all such points of difference the practice of the admiralty resembles that of equity. Indeed, there is greater difference between courts of law and admiralty than between law and equity. The processes and modes of admiralty, both of practice and decisions, are said to be equitable.³ On this subject one district court said: "A court of admiralty is, as to all matters falling within its jurisdiction, a court of equity. Its hands are not tied up by the rigid and technical rules of the common law, but it administers justice upon the large and liberal principles of courts

¹ 1 Ency. Pl. & Pr. 251.

² *Richmond v. New Bedford &c.*

³ *Moses Taylor, The*, 4 Wall. (U. S.) 315.
S.) 411.

which exercise a general equity jurisdiction.”⁴ This principle was further stated thus: “A Court of Admiralty is a Court of Equity. Extreme powers of a peculiar character have been conferred upon it, to enable it to determine speedily and with the least possible expense, by means of simple methods, all questions which may arise in respect to affairs of the sea. Not only has it the power but it is charged with the duty of devising methods by which all questions, of which it can take cognizance, can be adjudicated speedily and justly.”⁵ Of the difference in these courts Mr. Story said: “No proceedings can be more unlike than those in the common law and in admiralty.”⁶ Of this nature of the admiralty practice Lord Stowell said: “This court certainly does not claim the character of a court of general equity; but it is bound by its commission and constitution, to determine the cases submitted to its cognizance upon equitable principles, and according to the rules of natural justice.”⁷ But the courts of admiralty have never adopted and do not recognize the equity rule which requires two witnesses, or one witness and strong corroborative circumstances in order to overcome the verified answers of another.⁸

§ 3251. Equitable principles applied in case of negligence.—One of the best illustrations of the application of the equitable principles of admiralty courts is found in the nature of the relief granted in cases of collisions on account of negligence, and more especially in cases where it appears that both vessels have been at fault. In such cases admiralty courts have adopted the equitable rule that where the proof shows that both vessels are in fault the damages shall be equally apportioned between the offending vessels.⁹ The rule

⁴ *David Pratt, The*, 1 Ware (U. S.) 509; *Brown v. Lull*, 2 Sumn. (U. S.) 443; *Fortitudo, The*, 2 Dod. 58; *Cognac, The*, 2 Hagg. Adm. 377; *Virgin, The*, 8 Pet. (U. S.) 538, 550.

⁵ *Copp v. Decastro &c. Co.*, 8 Ben. (U. S.) 321; *Harden v. Gordon*, 2 Mason (U. S.) 541, 556; *Brown v. Lull*, 2 Sumn. (U. S.) 443; *Juliana, The*, 2 Dod. 504.

⁶ *Adeline, The*, 9 Cranch (U. S.) 244, 284.

⁷ *Juliana, The*, 2 Dod. 504, 521; *Fortitudo, The*, 2 Dod. 58, 70; *Rich-*

mond v. New Bedford &c. Co., 2 Low. (U. S.) 315; *Brown v. Burrows*, 2 Blatchf. (U. S.) 340, 4 Fed. Cas. No. 1995; *Benedict Adm. Pr.*, § 358.

⁸ *Sherwood v. Hall*, 3 Sumn. (U. S.) 127; *Jay v. Almy*, 1 Woodb. & M. (U. S.) 262; *Hutson v. Jordan*, 1 Ware (U. S.) 385.

⁹ *Continental, The*, 14 Wall. (U. S.) 345; *Explorer, The*, 20 Fed. 135; *Wanderer, The*, 20 Fed. 140. See §§ 3372-3374.

applies where it is shown that both vessels are in fault but only one of them is injured, as well as to cases where both vessels are injured. In such cases the rule as to the application of damages is that where both vessels are injured, the damages suffered by the two are added together and equally divided and the vessel whose damage exceeds the one-half is entitled to recover the excess against the other. Where one vessel only is injured it is entitled to recover one-half of its damages.¹⁰ The same principle was applied in a case of personal injury where the proof showed negligence of both parties.¹¹

§ 3252. Flexibility of admiralty courts—Admissibility of evidence.—The flexibility of the courts of admiralty is further extended to the admissibility of evidence arising from the nature of these courts and the jurisdiction exercised by them. It is a principle of these courts to proceed with the utmost expedition, and the fact that the cases arising may occur upon the high seas and in all parts of the world, coupled with the further fact that the subject matter of the litigation and the witnesses are constantly employed in voyages that involve perhaps thousands of miles of travel and many months and possibly years of absence, all require that these courts must proceed with the greatest possible dispatch and that they must at times necessarily admit evidence that in strict courts of law would be of doubtful competency. This principle was well stated by Dr. Lushington: "This power of the admiralty to adapt itself to the varying necessities of the case extends also to the form as well as the remedy to be administered in the proceedings. Upon this principle it has accordingly been held that admiralty has an undisputed juris-

¹⁰ *Catherine, The v. Dickinson*, 17 How. (U. S.) 170; *Rogers v. St. Charles, The*, 19 How. (U. S.) 108; *Chamberlin v. Ward*, 21 How. (U. S.) 548; *Washington, The*, 9 Wall. (U. S.) 513; *Sapphire, The*, 11 Wall. (U. S.) 164; *Ariadne, The*, 13 Wall. (U. S.) 475; *Continental, The*, 14 Wall. (U. S.) 345; *Atlee v. Packet Co.*, 21 Wall. (U. S.) 389; *Teutonia, The*, 23 Wall. (U. S.) 77; *Sunnyside, The*, 91 U. S. 208; *America, The*, 92 U. S. 432; *Alabama, The*, 92 U. S. 695; *Atlas, The*, 93 U. S. 302; *Juniata, The*, 93 U. S. 337; *Stephen Morgan, The*, 94 U. S. 599; *Virginia Ehrman, The*, 97 U. S. 309; *City of Hartford, The*, 97 U. S. 323; *Civilta, The*, 103 U. S. 699; *Connecticut, The*, 103 U. S. 710; *North Star, The*, 106 U. S. 17; *Sterling, The*, 106 U. S. 647; *Manitoba, The*, 122 U. S. 97.

¹¹ *Max Morris, The*, 137 U. S. 1, 11 Sup. Ct. 29, 28 Fed. 881; *Daylesford, The*, 30 Fed. 633; *Truro, The*, 31 Fed. 158; *Serapis, The*, 49 Fed. 393; *City of Rome, The*, 49 Fed. 392.

said: "The court of prize is emphatically a court of the law of nations; and it takes neither its character nor its rules from the mere municipal regulations of any country."²³ And it has at least been suggested that the principles of the common law as to process and proceedings have no application in courts of admiralty.²⁴

§ 3256. Evidence of usage—Sailing rules.—From the earliest history of navigation there have existed certain regulations for the purpose of preventing collisions between ships sailing the seas and engaged in maritime commerce. These were called sea laws, and in the course of time recognized as settled usage having a binding and obligatory effect. Such usages existed and were recognized long before there was any legislative control upon this subject. The courts of both law and admiralty constantly refer to the established usages of the sea as furnishing the rule by which to determine whether any fault of navigation was committed and who was responsible. It is true that laws and regulations have since been enacted, and where they apply they must be looked to as furnishing the sole rule for guidance. But where they do not apply evidence of usage is admissible. The rule on this subject has been aptly stated as follows: "Sailing rules and other regulations have since been enacted; and it is everywhere admitted that such rules and regulations, in cases where they apply, furnish the paramount rule of decision; but it is well known that questions often arise in such litigations, outside of the scope and operation of the legislative enactments. Safe guides, in such cases, are often found in the decisions of the courts, or in the views of standard text-writers; but it is competent for the court, in such a case, to admit evidence of usage; and, if it be proved that the matter is regulated by a general usage, such evidence may furnish a safe guide as the proper rule of decision."²⁵

§ 3257. Judicial notice.—The general rule of judicial notice is applicable to courts of admiralty.²⁶ According to adjudicated cases these courts take judicial notice of many natural phenomena as well

²³ *Adeline, The*, 9 Cranch (U. S.) 244.

²⁴ *City of Washington, The*, 92 U. S. 31.

²⁵ *Clarke v. New Jersey &c. Co.*, 1 Story (U. S.) 531; *Manro v. Almeida*, 10 Wheat. (U. S.) 473; *Harriet, The*, *Olcott* (U. S.) 222, 11 Fed. Cas. No. 6096.

²⁶ *Planter, The*, 7 Pet. (U. S.) 324, 342; *Apollon, The*, 9 Wheat. (U. S.) 362, 374.

as geographical positions that affect navigation generally, and which enter as an element in the determination of their jurisdiction. For this purpose the courts will judicially notice that New Orleans and New York Bay are within the ebb and flow of the tide. Thus it has been held that the court would judicially notice the geographical position of Sandy Hook.²⁷ And it has been held that the court would take judicial notice that the voyage of a vessel up the Mississippi River was above the ebb and flow of the tide and that wages arranged during such voyage could not be considered as earned in a maritime employment.²⁸ The rule as to this jurisdiction was thus stated by Judge Story: "The true test of its jurisdiction in all cases of this sort is, whether the vessel be engaged, substantially, in maritime navigation, or in interior navigation and trade, not on tide waters. In the latter case, there is no jurisdiction. So that, in this view, the district court had no jurisdiction over the steamboat involved by the present controversy; as she was wholly engaged in voyages on such interior waters."²⁹

§ 3258. Foreign laws—When proof required.—The general rule that a foreign law to be available must be pleaded and proved prevails generally in the courts of admiralty.³⁰ But it seems that this rule of practice has certain marked exceptions in the admiralty courts which are so pronounced as to make it practically a new rule. This general rule of proof in admiralty courts is limited to the pleading and proof of such laws of foreign nations as are designed only for the direction of their own affairs. But courts of admiralty will take judicial notice of the public laws of a foreign nation on subjects of common interest and concern to all nations and especially so when such laws are promulgated by the governing powers or the executive officers of any country. Chief Justice Marshall in an early case in speaking of the authorities on this subject said: "Several have been quoted (and such seems to have been the

²⁷ *United States v. La Vengeance*, 3 Dall. (U. S.) 297.

²⁸ *Thomas Jefferson, The*, 10 Wheat. (U. S.) 428; *Planter, The*, 7 Pet. (U. S.) 324, 342.

²⁹ *Orleans, The*, 11 Pet. (U. S.) 175.

³⁰ *Church v. Hubbard*, 2 Cranch (U. S.) 187; *Ennis v. Smith*, 14

How. (U. S.) 400; *Liverpool &c. Co. v. Phenix Ins. Co.*, 129 U. S. 397; *Dainese v. Hale*, 91 U. S. 13; *Pierce v. Indseth*, 106 U. S. 546; *Pawashick, The*, 2 Low. (U. S.) 142; *Lloyd v. Guilbert*, L. R. 1 Q. B. 115, 6 B. & S. 100; *Cridland, Ex parte*, 3 Ves. & B. 95.

general practice), in which the marine ordinances of a foreign nation are read as law, without being proved as facts. It has been said, that this is done by consent; that it is a matter of general convenience, not to put parties to the trouble and expense of proving permanent and well-known laws which it is in their power to prove; and this opinion is countenanced by the case cited from Douglas. If it be correct, yet, this decree having been promulgated in the United States as the law of France, by the joint act of that department which is entrusted with foreign intercourse, and of that which is invested with the powers of war, seems to assume a character of notoriety which renders it admissible in our courts."³¹

³¹ *Amelia, The*, 1 Cranch (U. S.) U. S. 397; *Maggie Hammond, The*, 9 1, 38; *Bernardi v. Motteux*, 2 Doug. Wall. (U. S.) 435, 452; *Pawashick*, 574; *Maria, The*, 1 Rob. Adm. 340; *The*, 2 Low. (U. S.) 142; *Penhallow v. Doane*, 3 Dall. (U. S.) 54, 91. *Scotland, The*, 105 U. S. 24; *Liverpool &c. Co. v. Phenix Ins. Co.*, 129

CHAPTER CLX.

PLEADING AND PROOF.

Sec.	Sec.
3259. Proof must come within the issues.	3267. Amendments—Hearing on appeal.
3260. Parties bound by allegations.	3268. Evidence heard on appeal.
3261. Effect of variance.	3269. Amendments on appeal and motion to examine witnesses—Distinction.
3262. Omissions and variations—Effect.	3270. Pleadings as evidence.
3263. Amendments—When allowed.	3271. Admissions in pleadings—Effect.
3264. Amendments—Time of making and effect.	3272. Special damages—Awarded under general pleading.
3265. Amendments—Not allowed.	
3266. Amendments not allowed—Illustrations.	

§ 3259. Proof must come within the issues.—The strict technical rules of pleading adopted and practiced in common law courts are not strictly adhered to in courts of admiralty. Yet the rule in admiralty practice is that the matters in controversy must be distinctly propounded, and each party must set forth by plain and precise allegations the grounds on which he asks for the judgment of the court in his favor, as well to disclose to the adverse party the points to which he must direct his proof, as to enable the court to see what is in controversy between them. The issues are determined by the distinct allegations on one side and the contradictions on the other, and a court of admiralty will not go outside of the issues thus formed.¹ This rule has been more aptly stated as follows: "The rules of pleading in the admiralty do not require all the technical precision and accuracy which is necessary in the practice of the courts

¹ Orne v. Townsend, 4 Mason (U. S.) 541; Soule v. Rodocanachi, Newberry Adm. 504; Boston, The, 1 Sumn. (U. S.) 328, 3 Fed. Cas. No. 1673; Treadwell v. Joseph, 1 Sumn. (U. S.) 390; Sarah Ann, The, 2 Sumn. (U. S.) 206; Confiscation Cases, The, 20 Wall. (U. S.) 92; William Harris, The, 1 Ware (U. S.) 367; Hays v. Pittsburgh &c. Co., 33 Fed. 552.

of common law. But they require that the cause of action should be plainly and explicitly set forth, not in any particular and sacramental formula, but in clear and intelligible language, so that the adverse party may understand what is the precise charge which he is required to answer, and make up an issue directly upon the charge. The evidence must be confined to the matters put in issue by the parties, and the decree must follow the allegations and proofs."² In a somewhat later case the rule was thus stated: "A cardinal principle in admiralty proceedings is, that proofs cannot avail a party further than they are in correspondence with the allegation of his pleadings, and that the decree of the court must be in consonance with the pleadings and the proofs."³ The general rule is that no evidence is admissible unless it comes within the issues made by the pleadings and there must be a substantial agreement between the pleadings and the proofs.⁴

§ 3260. Parties bound by allegations.—Following the practice in all other courts parties are bound by their allegations and proofs, and the former must be sustained by the latter.⁵ "The libelants must recover on the allegations in their libel; and the respondents

² *Jenks v. Lewis*, 1 Ware (U. S.) 51.

³ *Davis v. Leslie*, 1 Abb. Adm. 123; *Hoppet, The*, 7 Cranch (U. S.) 389; *Fashion, The, v. Ward*, 6 McLean (U. S.) 195; *Rhode Island, The, Olc.* (U. S.) 505; *Boston, The*, 1 Sumn. (U. S.) 328, 11 Am. Jur. 21, 3 Fed. Cas. No. 1673; *Sarah E. Kennedy, The*, 29 Fed. 264; *Morton, The*, 1 Brown Adm. 137, 17 Fed. Cas. N. 9864; *Sarah Ann, The*, 2 Sumn. (U. S.) 206, 21 Fed. Cas. No. 12342.

⁴ *Davis v. Leslie*, 1 Abb. Adm. 123, 7 Fed. Cas. No. 3639; *Washington Irving, The*, Abb. Adm. 336, 29 Fed. Cas. No. 17243; *Morton, The*, Brown Adm. 137, 17 Fed. Cas. No. 9864; *Kellum v. Emerson*, 2 Curt. (U. S.) 79, 14 Fed. Cas. No. 7669; *Campbell v. Uncle Sam, The*, 1 McAll. (U. S.) 77, 4 Fed. Cas. No. 2372; *Turner v. Black Warrior*, 1 McAll. (U. S.)

181, 24 Fed. Cas. No. 14253; *Kramme v. New England, Newb. Adm.* 481, 14 Fed. Cas. No. 7930; *Rhode Island, The, Olc.* 505, 20 Fed. Cas. No. 11745; *Sarah Ann, The*, 2 Sumn. (U. S.) 206, 21 Fed. Cas. No. 12342; *United States v. Hunter, Pet.* (U. S.) 10, 26 Fed. Cas. No. 15428; *Reppert v. Robinson, Taney* 492, 20 Fed. Cas. No. 11703; *William Harris, The*, 1 Ware 373, 29 Fed. Cas. No. 17695; *McKinlay v. Morrish*, 21 How. (U. S.) 343; *Pope Catlin, The*, 31 Fed. 408; *Hays v. Pittsburgh &c. Co.*, 33 Fed. 552; *Earnwell, The*, 68 Fed. 228.

⁵ *Morton, The*, Brown Adm. 137; *Cambridge, The*, 2 Low. (U. S.) 21, 4 Fed. Cas. No. 2334; *New England, The, Newberry Adm.* 481; *Dupont de Nemours v. Vance*, 19 How. (U. S.) 162; *McKinlay v. Morrish*, 21 How. (U. S.) 343; *Earnwell, The*, 68 Fed. 228.

must rely exclusively on the grounds they have selected in their answer."⁶ Evidence offered going to a defense which is not pleaded must be excluded according to the rules of admiralty practice.⁷

§ 3261. **Effect of variance.**—The admiralty courts almost wholly disregard the rules of variance as practiced and applied in the common law courts. In these courts there is no doctrine of merely technical variance. The rule as held in many cases is that no effect is allowed to a variance which cannot have surprised or injured the opposite party.⁸ In speaking of the difference between the rules on this subject in admiralty and the common law courts, a federal judge in a recent case said: "Under the strict rules of procedure of the common law, and the civil law, the doctrine of *secundum allegata et probata* is conclusive, and upholds the arbitrary rule of proceeding as paramount to all other considerations. But the practice of the admiralty courts of the United States permits of more flexibility of procedure. And in the endeavor to determine the case submitted to it upon equitable principles, the court will sometimes disregard mere technical rules and forms, and look only to the rules of natural justice. In this endeavor, the court uses its reason and discretion as a means of defeating chicanery, rectifying mistakes, supplying deficiencies and even suggesting to the party the means of reconstructing his case, if necessary, without the loss of such real progress as he may have already made."⁹ The courts have frequently held that there are no technical variances or departures in pleadings in admiralty.¹⁰

§ 3262. **Omissions and variations—Effect.**—It has been held that an omission to state some material facts will not be permitted to

⁶ *Campbell v. Uncle Sam*, 1 McAll. (U. S.) 77; *Turner v. Black Warrior*, 1 McAll. (U. S.) 181. See, *Rich v. Lambert*, 12 How. (U. S.) 347.

⁷ *Washington Irving, The*, Abb. Adm. 336, 7 N. Y. Leg. Obs. 4, 29 Fed. Cas. No. 17243; *Penhallow v. Doane*, 3 Dall. (U. S.) 54; *Swallow, The, Olc.* (U. S.) 334; *Shady Side, The*, 23 Fed. 731; *White v. Ranier, The*, 45 Fed. 773.

⁸ *Clement, The*, 2 Curt. (U. S.)

363, 5 Fed. Cas. No. 2879; *Crawford v. William Penn*, 3 Wash. (U. S.) 484, 6 Fed. Cas. No. 3373; *Henry v. Curry*, Abb. Adm. 433, 11 Fed. Cas. No. 6381.

⁹ *Davis v. Adams*, 42 C. C. A. 493, 102 Fed. 520; *Gazelle and cargo, The*, 128 U. S. 474, 9 Sup. Ct. 139.

¹⁰ *West v. Uncle Sam*, McAll. (U. S.) 505, 29 Fed. Cas. No. 17427; *Dupont de Nemours v. Vance*, 19 How. (U. S.) 162; *General Meade, The*, 20

Fed. 923.

work any injury to the pleader if it appears to the court that the omission was not purposely or designedly made; this is especially true where the opposite party was not surprised by the omission.¹¹ This rule has been carried to the extent of permitting a recovery in collision cases on proof of a fault different from that alleged in the libel.¹² A variation sufficient to defeat an action at law has been held to be disregarded in admiralty in a case where substantial justice could be done.¹³

§ 3263. Amendments—When allowed.—The most liberal rules as to amendments are found in practice in admiralty courts. In these courts amendments are permitted to the end that substantial justice may be done the parties. The only limitation on these liberal rules of amendments is that the court should not permit the party to be injured by the proposed amendment. Such amendments are not only permitted but may be directed or required by the court. The object or purpose of this rule is that the case may be disposed of upon its merits, and substantial justice be meted to the parties without the delay of another hearing.¹⁴

§ 3264. Amendments—Time of making and effect.—This rule of permitting amendments has been carried to the extent of holding "that in order that substantial justice may be done, the court will allow amendments to be made even at the hearing of an appeal, taking care that no injury be done to either party. And in case in-

¹¹ *Quickstep, The*, 9 Wall. (U. S.) 162; *Mary Ann, The*, 8 Wheat. 665; *Syracuse, The*, 12 Wall. (U. S.) 167; *Dupont de Nemours v. Vance*, 19 How. (U. S.) 162; *Coleman, The*, Brown Adm. 456, 6 Fed. Cas. No. 2981.

¹² *Cambridge, The*, 2 Low. (U. S.) 21, 4 Fed. Cas. No. 2334; *Iris, The*, 1 Low. (U. S.) 520, 13 Fed. Cas. No. 7062; *Martin Wyncoop, The*, 10 Blatchf. (U. S.) 167, 16 Fed. Cas. No. 9177.

¹³ *Talbott v. Wakeman*, 23 Fed. Cas. No. 13731a.

¹⁴ *City of New Orleans, The*, 33 Fed. 683; *Charles Morgan, The*, 115 U. S. 69, 5 Sup. Ct. 1172; *Dupont de Nemours v. Vance*, 19 How. (U. S.) 162; *Mary Ann, The*, 8 Wheat. (U. S.) 380; *Warren v. Moody*, 9 Fed. 673; *Morning Star, The*, 14 Fed. 866; *Samuel Marshall, The*, 49 Fed. 754; *Pennsylvania, The*, 12 Blatchf. (U. S.) 67, 19 Fed. Cas. No. 10951; *Virginia &c. Ins. Co. v. Sundberg*, 54 Fed. 389; *Richmond v. New Bedford &c. Co.*, 2 Low. (U. S.) 315, 20 Fed. Cas. No. 11800; *Adeline, The*, 9 Cranch (U. S.) 244; *Caroline, The*, 7 Cranch (U. S.) 496; *Anne, The*, 7 Cranch (U. S.) 576; *Edward, The*, 1 Wheat. (U. S.) 261; *Newell v. Norton*, 3 Wall. (U. S.) 257; *Cru-sader, The*, 1 Ware (U. S.) 437, 6 Fed. Cas. No. 3456.

juries should be likely to ensue from allowing amendments, the case would be continued to allow the party to take such evidence as he might deem material on the new issue."¹⁵ Under the admiralty rules amendments in matters of substance may be made on motion at any time before final decree. But what amendments may be allowed, and under what circumstances made, and the manner of their incorporation into the record, are all within the sound discretion of the court, subject to the rules of practice.¹⁶ This rule is so liberal that it will permit parties, after hearing, to amend the pleadings so as to embrace the proofs offered, which did not support the allegations of the libel as originally drawn.¹⁷ Amendments will always be permitted for the purpose of changing or increasing the claim for damages.¹⁸ Where objections are made on the hearing on account of defects appearing on the face of the pleadings, the court will permit the error to be rectified instantaneously.¹⁹ So pleadings will sometimes be deemed amended as a matter of course.²⁰ And where an answer admitted a material part of the matter stated in the libel, it has been held that by leave of the court it could be amended by withdrawing the admission. But such withdrawal could have no effect on the admission as evidence.²¹

§ 3265. Amendments—Not allowed.—While the doctrine of amendments in admiralty is equitable it is also reasonable, and unreasonable amendments will not be permitted. Nor will amendments be permitted which will operate unjustly or to the injury of the adverse party. The rule denying the right to amend was thus stated by one district judge: "If the amendment should be allowed, the libellant must, at the same time, be remitted to the same right of exception she would have had if the claim had been originally put in as amended. This would present a new issue, and one of a preliminary and dilatory character, and that after a hearing has been

¹⁵ *Morton, The*, 1 Brown Adm. 137, 17 Fed. Cas. No. 9864; *Boston, The*, 1 Sumn. (U. S.) 328, 3 Fed. Cas. No. 1673.

¹⁶ *Lamb v. Parkman*, 21 Law R. (1859) 589, 1 West L. Mo. 159, 14 Fed. Cas. No. 8019.

¹⁷ *Davis v. Leslie*, 1 Abb. Adm. 123, 7 Fed. Cas. No. 3639; *Davis v. Adams*, 42 C. C. A. 493, 102 Fed. 520.

¹⁸ *McCready v. Brother Jonathan*, 15 Fed. Cas. No. 8732a; *J. E. Trudeau, The*, 4 C. C. A. 657, 54 Fed. 907.

¹⁹ *Nevitt v. Clarke, Olc.* (U. S.) 316, 18 Fed. Cas. No. 10138.

²⁰ *Rhode Island, The*, 17 Fed. 554; *Maryland, The*, 19 Fed. 551.

²¹ *Kenah v. John Markee, Jr., The*, 3 Fed. 45.

had upon the merits."²² And the right to amend has been denied where the material facts are pleaded and the knowledge of the grounds relied upon by the opposite party; in such a case an amendment will not be permitted for the purpose of making the allegation correspond with the proof offered.²³ So, the court has refused to permit an answer to be amended after the case has been heard when such an amendment would destroy the effect of an admission relative to a matter which had been the principle subject of controversy.²⁴

§ 3266. Amendments not allowed—Illustrations.—This rule of the refusal to allow amendments was applied in a case where the defendants by their answer claimed to be the owners of the property in controversy, and on failure to establish such ownership by proof at the trial they were not permitted thereafter to amend their answer for the purpose of showing that they were mortgagees out of possession.²⁵ So claimants were not permitted to amend to the extent of changing the nature of their claim, where such an amendment would prejudice the rights of other creditors.²⁶ So an amendment will be denied which seeks to introduce new and inconsistent grounds where no evidence had been offered upon the subject and the witnesses of the adverse party had been excused.²⁷ So, an amendment to increase the claim which was not asked for until after trial and apportionment of damages, and where the claim as pleaded had been twice verified, was denied.²⁸

§ 3267. Amendments—Hearing on appeal.—The liberal rule of amendments in admiralty is extended to hearings on appeal. An appeal in admiralty is regarded by the appellate courts as equivalent to a new trial, and they exercise great liberality in permitting both new pleadings and new proofs in furtherance of justice. These courts

²² *Prindiville, The*, 1 Brown Adm. 485, 19 Fed. Cas. No. 11435.

²³ *Iola, The*, 11 N. Y. Leg. Obs. 263, 13 Fed. Cas. No. 7057.

²⁴ *Mary C., The*, 1 Hask. (U. S.) 474, 16 Fed. Cas. No. 9201; *Horace B. Parker, The*, 20 C. C. A. 572, 74 Fed. 640.

²⁵ *McCarthy v. Eggers*, 10 Ben. (U. S.) 688, 15 Fed. Cas. No. 8681.

²⁶ *Alanson Sumner, The*, 28 Fed.

670; *General Sedgwick, The*, 29 Fed. 606; *Zodiac, The*, 5 Fed. 220.

²⁷ *Keystone, The*, 31 Fed. 412; *Iona, The*, 26 C. C. A. 261, 52 U. S. App. 199, 80 Fed. 933; *United States v. One Hundred Twenty-three Casks &c.*, 1 Abb. (U. S.) 573, 27 Fed. Cas. No. 15943; *Circassian, The*, 2 Ben. (U. S.) 171, 5 Fed. Cas. No. 2723.

²⁸ *New Haven &c. Co. v. Mayor*, 36

Fed. 716.

on appeal are not constrained by arbitrary rules, and they may or may not receive evidence which ought to have been, but was not produced in the court of original jurisdiction. Where it was shown to the court on appeal that the appellant had refused to appear in the district court, it was held that he would not be permitted to contest the merits of the decree in the appellate court.²⁹ The practice established by some of the earlier cases was not only to permit amendments on appeal, but to permit supplementary libels or answers, or to allow either party to file new allegations and proofs, especially where it is clearly established that the knowledge of the circumstances had been obtained after the decree of the district court; but in such cases the proof was confined to the new allegations, or to those of which no proof had formerly been given.³⁰

§ 3268. Evidence heard on appeal.—The new rule is substantially the same as the practice has always been, to show good reasons for the admissibility of evidence on appeal which was not introduced at the original hearing, and to make it discretionary with the court to hear such evidence.³¹ And where no excuse or reason is shown in the moving papers why the witnesses were not examined in the court below the court may refuse to permit their examination on appeal.³² The authorities clearly show that ordinary appeals in admiralty are not heard *de novo* in the Supreme Court in the same sense or to the same extent as in cases on appeal to the circuit court.³³

§ 3269. Amendments on appeal and motion to examine witnesses
Distinction.—The Supreme Court seems to have made a distinc-

²⁹ *Farrell v. Campbell*, 7 Blatchf. (U. S.) 158; *Flying Fish, The*, Brown & Lush. 436; *Ostris, The*, 2 Hagg. Adm. 135; *General Palmer, The*, 2 Hagg. Adm. 323; *Glenmanna, The*, Lush. 115, 122; *Farrell v. Campbell*, 7 Blatchf. (U. S.) 158; *Samuel, The*, 1 Wheat. (U. S.) 9; *Mary, The*, 8 Cranch (U. S.) 388; *Gray Jacket, The*, 5 Wall. (U. S.) 342; *Mabey, The*, 10 Wall. (U. S.) 419; *Western Metropolis, The*, 12 Wall. (U. S.) 389; *Juniata, The*, 91 U. S. 366; *Venezuela, The*, 3 C. C. A. 319, 52 Fed. 873.

³⁰ *Boston, The*, 1 Sumn. (U. S.)

328; *Coffin v. Jenkins*, 3 Story (U. S.) 108; *Venezuela, The*, 3 C. C. A. 319, 52 Fed. 873; *Cushman v. Ryan*, 1 Story (U. S.) 91, 6 Fed. Cas. No. 3515.

³¹ *Venezuela, The*, 3 C. C. A. 319, 52 Fed. 873; *Rose v. Himely, Bee* (U. S.) 313; *Generous, The*, L. R. 2 Ad. & El. 57; *Moorsley, The*, 1 Asp. 471; *William, The*, 7 Ir. Jur. 354.

³² *Mabey, The*, 10 Wall. (U. S.) 419.

³³ *Lucille, The*, 19 Wall. (U. S.) 73; *Mabey, The*, 10 Wall. (U. S.) 419; *Charles Morgan, The*, 115 U. S. 75, 5 Sup. Ct. 1172.

tion between amendments on appeal and motions to examine witnesses in the appellate court. The rule as to amendments was thus stated: "There can be no substantial amendments in this court; but if the pleadings or evidence are so defective that no decree can be founded upon them, and the case appears to have merits, the court will reverse the decree and remand the cause to the court below with directions to permit the amendments and further proof."³⁴

§ 3270. Pleadings as evidence.—The authorities are not unanimous on the question either of the effect or the admissibility of the answer as evidence. It would seem that the rule in chancery and the rule in admiralty are not the same.³⁵ The rule as to the admissibility and effect of pleadings in evidence is thus stated: "It is admitted that the sworn answer of the respondent stating in detail and with exactness the matters of defense, though not evidence in the strict sense of the word, may be referred to, to explain ambiguities in the testimony and, in aid of presumptions arising from the evidence, to supply connecting links in the proof; and that it is ordinarily entitled to more consideration than the naked statement of a party unsupported by his oath. But the degree of credit allowed to an answer in this respect must depend on the apparent good faith with which it is made. The credit of an answer in the admiralty is not measured by any technical rule, as it is in equity. And as it derives its credit from the good faith of the respondent, we may look for the evidence of that good faith, not only to the answer itself but to all the facts in the cause bearing on that question."³⁶ The general rule stated by a recent text-writer is as follows: "The answer to the libel has no more force as evidence than the libel itself has. They are not evidence, in the common sense of the word. Being, however, the solemn statement of facts by the parties, under the solemnity of an oath, the court is bound to examine them carefully, and it is impossible that they should not influence the mind of the court; in many cases of nicely-balanced proofs, the influence of the pleadings may well turn the scale."³⁷ The Supreme Court stated the rule thus:

³⁴ *Caroline, The*, 7 Cranch (U. S.) 55 Fed. 526; *Mabey, The*, 10 Wall. 496; *Edward, The*, 1 Wheat. (U. S.) 419.
³⁵ *Divina Pastora, The*, 4 Wheat. (U. S.) 52; *Mary Ann, The*, 8 Wheat. (U. S.) 380; *Palmyra, The*, 12 Wheat. (U. S.) 1; *Sarah Ann, The*, 2 Sumn. (U. S.) 206; *Beeche Dene, The*, 5 C. C. A. 207,
³⁶ *Hutson v. Jordan*, 1 Ware (U. S.) 385.
³⁷ *Crusader, The*, 1 Ware (U. S.) 448, 6 Fed. Cas. No. 3456.
³⁸ *Benedict Adm. Pr.*, § 518.

"The answer is not of itself evidence to establish such a fact, but it must be made out by due and suitable proofs; for in the admiralty the same rule does not prevail as in equity, that the answer to matters directly responsive to the allegations of the bill, is to be treated as sufficient proof of the facts in favor of the respondent, unless overcome by the testimony of two witnesses, or by one witness and other circumstances of equivalent force. The answer may be evidence, but it is not conclusive."³⁸ In an action in rem an earlier district court held the principle that the answer of the owners which admitted facts to their prejudice would prevail in favor of the libelants against the testimony of one witness.³⁹ It was said in one case that a verified claim in admiralty was not evidence; that it was no more than "the exclusion of a conclusion."⁴⁰

§ 3271. Admissions in pleadings—Effect.—Neither party can introduce evidence to contradict the averments set forth in his pleading, and the adverse party is entitled to accept any admissions pertinent to the issue as conclusive against the party making them. Thus, where it was averred that the steamboat was in motion, it was held that the pleader was precluded from denying that fact, and that the adverse party was not required to produce witnesses to show a different state of facts.⁴¹ And admissions in an answer may be sufficient to entitle a libellant to recover the amount of his claim.⁴² In the absence of a replication it has been held that the libellant thereby admits the allegations in the answer.⁴³ So, it has been held that the admissions in an answer will prevail against the testimony of the pilot of the vessel.⁴⁴ But allegations that are neither admitted nor

³⁸ *Andrews v. Wall*, 3 How. (U. S.) 568; *Eads v. H. D. Bacon, The*, 1 Newb. 274, 8 Fed. Cas. No. 4232; *Jay v. Almy*, 1 Woodb. & M. 262; *United States v. Matilda*, 5 Hughes (U. S.) 44, 4 Hall L. J. 478, *Brunner Col. Cas.* 258, 26 Fed. Cas. No. 15741; 2 *Conklin Adm.* 620-622.

³⁹ *Santa Claus, The, Olc.* (U. S.) 428.

⁴⁰ *Thomas, The, v. United States*, 1 Brook. (U. S.) 367, 23 Fed. Cas. No. 13919.

⁴¹ *Totten v. Pluto*, 24 Fed. Cas. No. 14106; *Ward v. Fashion, Newb.*

8, 6 McLean (U. S.) 152, 29 Fed. Cas. No. 17154; *Whitney v. Empire State*, 1 Ben. (U. S.) 57, 29 Fed. Cas. No. 17586.

⁴² *Belle, The*, 6 Ben. (U. S.) 287, 3 Fed. Cas. No. 1271.

⁴³ *Mary Jane, The*, 1 Blatchf. & H. (U. S.) 390, 16 Fed. Cas. No. 9215; *Sea Gull, The, Chase* 145, 21 Fed. Cas. No. 12578; *Thomas v. Gray*, 1 Blatchf. & H. 493, 23 Fed. Cas. No. 13898.

⁴⁴ *Santa Claus, The*, 1 Olc. 428, 21 Fed. Cas. No. 12327.

denied cannot be taken as true.⁴⁵ So, it has been held that a party may use one admission in the pleading of his adversary without being bound by others.⁴⁶ The admiralty court, like other courts, cannot determine the amount of damages, on default, from the allegations of the libel; the damages must be determined by the court from the evidence.⁴⁷

§ 3272. Special damages—Awarded under general pleading. Admiralty courts are not so technical as to require special damages to be specially pleaded. They will award full relief on general averments. The rule is that where the libellant avers with distinctness the substantive facts upon which he relies and prays either specially or generally for appropriate relief the court may award any relief warranted by the law applicable to the case.⁴⁸ It is held that admiralty courts will not be prevented from enforcing equitable rights and plain obligations because of technical objections as to matter of form or on account of the relief demanded.⁴⁹ The general rule is thus stated: "A court of admiralty is not limited in its decree to the precise amount for which the libel is entered. When it appears on investigation that the libellant has merit, and that justice requires a larger remuneration than he has demanded in his libel, the court is not precluded by any technical forms from doing full justice."⁵⁰ The general rule is that damages will be awarded under prayer for general relief.⁵¹ But it is held that the court cannot grant a relief which is inconsistent with or entirely different from that which is asked for.⁵² And the proof of the respective parties must conform,

⁴⁵ *Clarke v. Dodge Healy, The*, 4 2 Low. (U. S.) 21, 4 Fed. Cas. Wash. (U. S.) 651, 5 Fed. Cas. No. 2849; *Dictator, The*, 30 Fed. 699; *Venezuela, The*, 5 C. C. A. 159, 55 Fed. 416.

⁴⁶ *Berry v. Montezuma, The*, 3 Fed. Cas. No. 1358a.

⁴⁷ *Cape Fear &c. Co. v. Pearsall*, 33 C. C. A. 161, 90 Fed. 435; *Miller v. United States*, 11 Wall. (U. S.) 268; *Hightower v. Hawthorne, Hemp.* (U. S.) 42, 12 Fed. Cas. No. 6478b.

⁴⁸ *Gazelle and Cargo, The*, 128 U. S. 474, 487, 9 Sup. Ct. 139; *Syracuse, The*, 12 Wall. (U. S.) 167; *Dupont de Nemours v. Vance*, 19 How. (U. S.) 162; *Cambridge, The*,

No. 2334; *Dexter v. Munroe*, 2 Sprague (U. S.) 39, 7 Fed. Cas. No. 3863.

⁴⁹ *Dexter v. Munroe*, 2 Sprague (U. S.) 39, 7 Fed. Cas. No. 3863.

⁵⁰ *Pratt v. Thomas*, 1 Ware (U. S.) 427, 19 Fed. Cas. No. 11377; *McCready v. Brother Jonathan, The*, 15 Fed. Cas. No. 8732a; *Grubbs v. John C. Fisher, The*, 22 Pitts. L. J. 122; *Jonge Bastiaan*, 5 Rob. Adm. 322.

⁵¹ *Penhallow v. Doane*, 3 Dall. (U. S.) 54, 86.

⁵² *Wilson v. Graham*, 4 Wash. (U. S.) 53, 30 Fed. Cas. No. 17804.

within limits already stated, to the issues tendered by their pleadings. In other words, as said in a recent case, "the defendant's testimony must accord with the articles of the answer just as the libelant's testimony must follow the articles of the libel. The parties make up their issues, and must stay by them to the end."⁵³

⁵³ Barber v. Lockwood, 134 Fed. §§ 3259, 3260. But compare § 3261. 985, 986. See also, McKinlay v. 3275. By libelant. Morrish, 21 How. (U. S.) 243; *ante*,

CHAPTER CLXI.

INTERROGATORIES.

Sec.	Sec.
3273. Practice—Generally.	3278. Limitations.
3274. Time of delivering interrogatories.	3279. Materiality of interrogatories.
3275. By libellant.	3280. Interrogatories as evidence.
3276. By defendant.	3281. Interrogatories as evidence for or against party.
3277. Office of interrogatories.	

§ 3273. **Practice—Generally.**—It seems to be the universal practice in admiralty courts for one party to obtain evidence by means of interrogatories to the opposite party to be by him answered under oath. The object of this is apparently two-fold. (1) For the purpose of obtaining facts to fully and accurately state either the libel or the answer; (2) to avoid obtaining or producing evidence that may be admitted or given in answer to interrogatories by the opposite party. The general practice as to submitting interrogatories in admiralty courts is not essentially different from the practice in other courts both in England and America. Mr. Benedict says of this subject: "The later authorities seem to have settled the law that the answers to these special interrogatories are not evidence but pleading."¹ Either party may propound interrogatories touching the matter in issue and append them to his pleading; these the adverse party must answer under oath, or the matter may be taken against him *pro confesso*.²

§ 3274. **Time of delivering interrogatories.**—The practice or method of filing interrogatories is governed generally by the admiralty

¹ Benedict Adm. Pr., § 519. For questions of practice and forms of interrogatories, see, Appendix, 2 Wheat. (U. S.) 81; 1 Rob. 381.

² David Pratt, The, 1 Ware (U. S.) 495, 7 Fed. Cas. No. 3597; Australia, The, 3 Ware (U. S.) 240, 2 Fed. Cas. No. 667; Gammell v.

Skinner, 2 Gall. (U. S.) 45, 9 Fed. Cas. No. 5210; Scobel v. Giles, 19 Fed. 224; Edwin Baxter, The, 32 Fed. 296; Havermeyers &c. Co. v. Compania &c. Espanola, 43 Fed. 90; Stoffregan v. Mexican Prince, The, 70 Fed. 246; Admiralty Rules 23, 27, 30, 32.

court act or the general rules of the court. The practice for delivering interrogatories is thus stated by a writer in a recent work on admiralty practice as the sum of the rules: "The plaintiff or defendant, by leave of the court or judge, may deliver interrogatories in writing for the examination of the opposite parties, or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof, stating which of such interrogatories each of such persons is required to answer; provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose; provided also that interrogatories which do not relate to any matters in question in the cause or matter shall be deemed irrelevant, notwithstanding they might be admissible on the oral cross-examination of a witness."³ According to the rules of order in the English practice, "the plaintiff may at the time of delivering his statement of claim, or at any subsequent time not later than the close of the pleadings, and a defendant may, at the time of delivering his defense, or at any subsequent time not later than the close of the pleadings, without any order for that purpose, and either party may at any time, by leave of the court or a judge, deliver interrogatories in writing for the examinations of the opposite party or parties or any one or more of such parties."⁴ So, it has been held that the court may order interrogatories to be administered before the filing of the petition, where the court is of the opinion that such interrogatories are necessary to elicit facts in the case, and are within the scope of the object for which interrogatories are allowed.⁵ Where interrogatories are delivered by the plaintiff before the defendant has delivered his statement of defense, it has been held that sufficient reason must be shown for delivering them at such a time or they will be struck out.⁶

§ 3275. By libelant.—The libelant may submit interrogatories at the close of his libel, and require that the defendant answer the same under oath. That part of the admiralty rule governing the practice on the part of the libelant is stated thus: "And the libelant may further require the defendant to answer on oath all interrogatories propounded by him touching all and singular the allega-

³ Williams & Bruce Adm. Jur. & Pr. 410.

⁵ Murillo, The, 1 Asp. (N. S.) 579.

⁶ Mercier v. Cotton, L. R. 1 Q. B.

⁴ Bolckow v. Fisher, L. R. 10 Q. B. 442.
161; Cashin v. Craddock, L. R. 2 Ch. Div. 140.

tions in the libel at the close or conclusion thereof.”⁷ The rule of practice is thus stated by a recent writer on Admiralty: “If the libelant desires to address himself to the conscience of the defendant, and to compel him to give testimony as to the matters in controversy, he may close his libel with interrogatories, touching all and singular the allegations in the libel, and demand that the defendant answer them under oath. The practice of thus inserting proper interrogatories tends greatly to the promotion of justice, and its prompt and economical administration, by reducing to its narrowest compass that portion of the cause which is to occupy the time of the judge and the witnesses in court.”⁸

§ 3276. By defendant.—The defendant has the same right as the libelant to require answers to interrogatories which he may at the close of his answer propound to the libelant touching any matter charged either in the libel or set up as a defense in his answer.⁹ The rule is more fully stated by Mr. Benedict as follows: “As the libelant has the right to propose interrogatories to the defendant, so the defendant has the right to resort to the oath of the libelant, and may, at the close of his answer, propose to the libelant any interrogatories touching any matters charged in the libel, or touching any matters of defense set up in the answer. These interrogatories should be numbered, and the libelant must answer in writing in detail, under oath or solemn affirmation, each interrogatory in the order of their numbers. Like the defendant, the libelant is not bound to answer any interrogatory which will expose him to any prosecution or punishment for crime or any penalty, or any forfeiture of his property for any penal offense.”¹⁰

§ 3277. Office of interrogatories.—While the answers to interrogatories may serve as evidence and avoid producing witnesses as to the matters answered, yet the interrogatories have and perform a different office or function. They, with the answers, are intended to aid the pleadings and are sometimes regarded as an amplification of the pleadings and are designed to bring out distinctly before the court the precise points or propositions relied upon. The office of such interrogatories, together with their answers, was defined by one district court thus: “Such answers to interrogatories are designed

⁷ Admiralty Rule 23.

⁹ Admiralty Rule 32.

⁸ Benedict Adm. Pr., § 412. See also, *Dana v. Cosmopolitan &c. Co.*, 134 Fed. 158.

¹⁰ Benedict Adm. Prac., § 477.

rather as compulsory amplifications of the pleadings on the specific subjects propounded in the interrogatories, so as to dispense with the taking of proof, or evidence proper or the facts that may be admitted. When the interrogatories are propounded by the libel, the replies usually make part of the answer itself."¹¹ And as stated by another district court: "Such interrogatories, derived from the practice of the civil law, are designed to supercede the necessity of proof, and to bring out distinctly before the court the point on which the defense or claim is intended to be rested."¹²

§ 3278. Limitations.—The rule requiring that the interrogatories shall seek to elicit matters material to the issue necessarily implies certain limitations as to such interrogatories. But these limitations are not wholly matters of implication. The rule is that neither party is bound to answer any interrogatory which will tend to criminate himself or which will expose him to any prosecution or punishment for a crime, or which might subject him to any penalty or to any forfeiture of his property for any penal offense.¹³ Interrogatories may be asked as to whether or not particular and material facts properly within the issues did or did not occur; but a party cannot be compelled by answer to an interrogatory to state what evidence he may have as to whether such material facts did or did not occur.¹⁴ Nor can a party be required to give information in answer to an interrogatory which is in the nature of hearsay or rumor or which he has derived from third persons not in any way connected with the action or subject to his control. But the rule seems to be that a party may be required to give material matter the knowledge of which is acquired by him from his agents or servants while in the ordinary course of their employment unless he is able to show that such agents or servants left his employment before he acquired such knowledge, or that it would occasion unreasonable expense or an unreasonable amount of detail. This rule was thus stated by an English Judge: "It seems to me that where a party is interrogated as to matters done, or omitted to be done, by his agents and servants in the course of their employment, he does not sufficiently answer, by saying that he does not know and that he has no information upon the subject. He is bound to go further and obtain information from

¹¹ *Serapis, The*, 37 Fed. 436. . v. *Ronalds*, 17 Jur. 393; *Scott v.*

¹² *Stoffregan v. Mexican Prince*, 70 Fed. 246. *Miller, Johnson* 328.

¹⁴ *Bolckow v. Fisher*, L. R. 10 Q.

¹³ *Mary or Alexandra, The*, L. R. 2 B. 161, 170; Admiralty Rules 31, 32. A. & E. 319, 38 L. J. N. S. 29; *Fisher*

such agents or servants of his, or he must show some sufficient reason for not doing it."¹⁵

§ 3279. Materiality of interrogatories.—The fundamental requisite of interrogatories is that they must elicit evidence which is material to the issue. The libellant has the right to require the defendant to answer any special interrogatories which may be put touching the matters in issue.¹⁶ As stated by a district court: "The practice is essentially the same as that in equity, in which the interrogatories are limited to the subjects contained in the libel."¹⁷ This rule was very aptly stated by an English judge thus: "The cardinal principle by which I intend to be governed in this matter is, that the interrogatories ought to be such as tend bona fide to support the case of the plaintiff, and to favor a complete inquiry into the truth of the issue which the court has to decide."¹⁸

§ 3280. Interrogatories as evidence.—As previously suggested one object and purpose of interrogatories is to dispense with the production of witnesses. Hence, the answers to interrogatories may dispense entirely with all other evidence. The answers to such interrogatories as are propounded at the close of the pleadings under the admiralty rules, are not regarded as evidence in the strict sense of the word; they are not evidence in a different sense than that in which the pleadings are evidence. But it is immaterial whether they are answered as parts of the pleadings or separately. In this condition they stand as evidence precisely like the pleadings, and what is admitted by such answers needs no further proof, and for the purpose of evidence or argument they may be referred to by either party.¹⁹ The rule as to the use of interrogatories in evidence has been

¹⁵ *Bolckow v. Fisher*, L. R. 10 Q. B. 161; *Minnehaha, The*, L. R. 3 A. & E. 148; *Isle of Cyprus, The*, L. R. 15 P. D. 134.

¹⁶ *David Pratt, The*, 1 Ware (U. S.) 495, 7 Fed. Cas. No. 3597; *Gammell v. Skinner*, 2 Gall. (U. S.) 45, 9 Fed. Cas. No. 5210; *Radnorshire, The*, L. R. 5 P. D. 172; *Williams & B. Adm. Jur. & Prac.* 411.

¹⁷ *Edwin Baxter, The*, 32 Fed. 296.

¹⁸ *Mary or Alexandra, The*, 2 Ad. & El. 319.

¹⁹ *Serapis, The*, 37 Fed. 436; *Australia, The*, 3 Ware (U. S.) 240, 2 Fed. Cas. No. 667; *Hutson v. Jordan*, 1 Ware (U. S.) 385, 12 Fed. Cas. No. 6959; *David Pratt, The*, 1 Ware (U. S.) 495, 7 Fed. Cas. No. 3597; *Cushman v. Ryan*, 1 Story (U. S.) 91, 6 Fed. Cas. No. 3515; *L. B. Goldsmith, The*, Newb. 123, 15 Fed. Cas. No. 8152; *Eads v. H. D. Bacon*, Newb. 274, 8 Fed. Cas. No. 4232.

stated as follows: "Any party may, at the trial of a cause, matter, or issue, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer: provided always, that in such case the judge may look at the whole of the answers, and if he shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in."²⁰

§ 3281. Interrogatories as evidence for or against party.—The answers to interrogatories are evidence against the party making such answers on the principle of admissions against interest. And they may be, in some cases, sufficient to establish the issues on behalf of the party submitting the interrogatories, or they may be sufficient to defeat the action or the cause of defense set up by the party answering the interrogatories. There seems to be some conflict in the adjudicated cases as to whether or not the answers to the interrogatories may be used as evidence in favor of the party making them. Some cases hold that they cannot be so used. This conflict may be more apparent than real. In one case in referring to the answers to interrogatories propounded at the close of the pleading the court said that "such answers are not affirmative proof in favor of the party making them."²¹ In another case, in speaking of interrogatories filed at the close of the libel, the court said: "The master, by answering these interrogatories, would make his answers evidence. For though the general answer of the respondent is not properly evidence any further than the charges in the libel, which are equally verified by oath, yet the answers to special interrogatories, which are sometimes subjoined to the libel, and sometimes put out of hearing, are evidence."²² Perhaps the correct rule on this subject was stated by Judge Story as follows: "The answer of the respondent in reply to interrogatories does not in the admiralty constitute positive evidence in his favor. Its true effect is, to furnish evidence for the other party, or, in a case hanging in equilibrio in point of proof to turn the scale in favor of the respondent."²³ But as to answers to special interrogatories the

²⁰ *Williams v. Bruce* Adm. Jur. & S.) 495, 7 Fed. Cas. 3597; Order Pr. 413; *Lyell v. Kennedy*, L. R. 27 XXXI, Rule 24.

Ch. Div. 1.

²¹ *Cushman v. Ryan*, 1 Story (U.

²² *Serapis, The*, 37 Fed. 436.

S.) 91, 103, 6 Fed. Cas. No. 3515;

²³ *David Pratt, The*, 1 Ware (U. S.) *Hutson v. Jordan*, 1 Ware (U. S.)

rule was stated thus: "In the admiralty practice in this country, it is believed, that when a party is required to answer special interrogatories, put at the hearing, the answers are evidence as well for the party who is interrogated, as for the other party."²⁴

385; *Cushing v. Laird*, 6 Ben. (U. S.) 408. See also, *Australia, The*, 3 Ware (U. S.) 240, 2 Fed. Cas. No. 667; *L. B. Goldsmith, The, Newb. Adm.* 125, 15 Fed. Cas. No. 8152. ²⁴*Hutson v. Jordan*, 1 Ware (U. S.) 385, 401.

CHAPTER CLXII.

DISCOVERY AND INSPECTION OF DOCUMENTS.

Sec.	Sec.
3282. Discovery of documents.	3286. Production of documents—Affidavit.
3283. Demand.	
3284. Application for discovery—Practice.	3287. Discovery—Illustrations.
3285. Discovery—Discretion of judge.	3288. Privileged documents.
	3289. Documents privileged.
	3290. Documents—When privileged.
	3291. Waiver of privilege—Effect.

§ 3282. **Discovery of documents.**—The practice in admiralty in the matter of inspection and discovery of documents is not essentially different, in the main, from that in other courts. It is the rule that either party may apply to the court, or to a judge for an order directing the opposite party to produce for inspection or use documents relating to the matters in controversy which are in his possession or which have been in his possession or under his control. It seems to be the rule that the party making the application need not file any affidavit or description of the document required. The court or judge on hearing the application may either refuse or adjourn the same if he is satisfied that the discovery is not necessary; or he may, in his discretion, make such order and require documents generally to be produced, or he may limit the order to particular documents or to a particular class of documents.¹

§ 3283. **Demand.**—While it is the rule that an order for inspection of documents will be made, it is also the rule that the applicant should show a previous demand or application to the adverse party; in the absence of such a showing the applicant may be condemned in costs.^{1*} The general rule seems to be that a party is not entitled to see any document which does not tend to make out his case.² The plaintiff must show that the documents desired are essential to the

¹ For Discovery, Production and Inspection of Documents, see Vol. II, Chap. 68.

^{1*} *Memphis, The*, 3 Ad. & El. 23.

² *Jenkins v. Bushby*, 35 L. J. Ch. 400; *Budden v. Wilkinson*, L. R. (1893), 2 Q. B. 432.

statement of his claim.³ In an action by the owner for damages to his goods where it was made to appear that a former action against the same vessel had been settled by a written compromise and agreement, it was held that the plaintiff on such showing was entitled to discovery and inspection of the written article for the purpose of using any admissions as to negligence made by the owners of the vessel.⁴

§ 3284. Application for discovery—Practice.—According to the practice rule an application for discovery may be made without filing any affidavit. But if made without filing the affidavit it must comply strictly with the rule and must show what the matters in question are.⁵ Under this practice the order for the discovery or the production of the document until the statement of defense is delivered. Unless the matters in question are known it cannot be determined whether the documents desired relate to the matters in question.⁶

§ 3285. Discovery—Discretion of judge.—There are instances or circumstances under which the trial court may exercise his discretion as to whether or not he will grant the discovery prayed for. And there are cases where the decision and judgment of the trial court will not be questioned on appeal. Thus where, by consent of the parties to the action, the documents of which inspection was sought were submitted to the trial judge, his decision was held to be final. But the general rule seems to be that the trial court has no discretion to refuse to grant the discovery prayed for except where it is made to appear that the documents, the discovery of which is prayed for are privileged.⁷ It has been held that the court has discretionary power to make an order for discovery and production of documents at any time after the writ is issued, even before the issues have been defined by the pleadings.⁸

§ 3286. Production of documents—Affidavit.—The opposite party must, when ordered, produce the documents specified in the order.

³ *Cashin v. Craddock*, L. R. 2 Ch. Div. 140.

⁴ *Hutchinson v. Glover*, L. R. 1 Q. B. 138, 3 Asp. (N. S.) 85.

⁵ Order XXXI, Rule 12.

⁶ *Hancock v. Guérin*, L. R. 4 Ex. Div. 3.

⁷ *Bustros v. White*, L. R. 1 Q. B. 423; *West of England, The*, 1 Ad. & El. 308; *Daniell v. Bond*, 3 L. T. N. S. 700.

⁸ *Mellor v. Thompson*, 49 L. T. N. S. 222.

On production of the documents in his possession he is required to file an affidavit stating: (1) The documents which are in his possession or power which relate to the matters in controversy; (2) the documents relating to the questions in controversy which were, but are no longer in his possession or under his control; (3) what has become of the documents no longer in his possession and when they were last in his possession or under his control. If such party has not and never had in his possession any documents in reference to the matter in controversy he should fully so state in his affidavit. He should show by his affidavit that according to his best knowledge, information and belief, he has not and never did have in his possession, custody or power, or in the possession, custody or power of his solicitors or agents or of any person on his behalf any "deed, account, book of account, voucher, receipt, letter, memorandum, paper or writing or any copy of or extract from any document, or any other document whatsoever, related to the matter in question." If any document has been produced he should then say "other than and except" the document set forth in the schedules to the affidavit. It is difficult to state any rule as to the sufficiency of the affidavit of discovery. The object of the affidavit is to enable the court to make an order for the production of documents described with a sufficient description to compel the production if ordered. As an illustration of this rule, which is applicable, though not in an admiralty case, an affidavit was held sufficient which stated: "We have also in our possession or power certain documents, numbered 1 to 26, inclusive, which are tied up in a bundle marked A, and initialed by the deponent G. S. Budden. The said documents last mentioned relate solely to the title or to the case of us, the plaintiffs, and not to the case of the defendants, nor do they tend to support it; wherefore we object to produce the same and say they are privileged from production."* But the affidavit of documents is not conclusive upon the party applying for the order of inspection, and after such affidavit is made he may have an order for the same where he makes an affidavit specifying such document and states therein that he believes the document to contain entries which he would be entitled to inspect, and that it is in the possession or power of the other party, notwithstanding

* Budden v. Wilkinson, L. R. Coope & Co. v. Emmerson, L. R. 12 (1893) 2 Q. B. 432; Greenwood v. App. Cas. 300; Taylor v. Batten, L. Greenwood, 6 W. R. 119; Pelle v. R. 4 Q. B. 85; West of England Stoddart, 1 Mac. & G. 192; Bewicke Bank v. Canton Ins. Co., L. R. 2 Ex. v. Graham, L. R. 7 Q. B. 400; Ind, Div. 472.

that the affidavit of document states fully and explicitly that the party making it has not in his possession or power "any deed, etc."¹⁰

§ 3287. **Discovery—Illustrations.**—In an action against a managing owner of ships for an account, it has been held that he must discover all documents that related to the matter in controversy whether in his individual possession or in that of a firm of which he is a member.¹¹ So, in an action for goods damaged by leakage where it appeared that while lying at a foreign port, the vessel was surveyed and repaired, it was held that the plaintiff was entitled to the inspection of the surveys and the shipwright's bill for the reason that the repairs made would show whether the damage was occasioned by unseaworthiness as alleged in the libel.¹² So, discovery or inspection of documents may be ordered even where such documents will disclose the secrets of the party's business or of his trade.¹³ In an action on a policy of Marine insurance the plaintiff is entitled to have inspection of the log where it appeared that the vessel was abandoned.¹⁴ So, in such an action it has been held that the assured must lay before the underwriters everything which throws light on any part of the transaction in which both parties are interested, and this was held to include letters between the captain and the plaintiff.¹⁵ But in such an action it has been held that the defendant is not entitled to have the proceedings stayed until the plaintiff has obtained an affidavit of document from the person who is neither a party to the action nor within the jurisdiction of the court when under the plaintiff's control.¹⁶

§ 3288. **Privileged documents.**—Public documents are privileged from inspection and this includes reports made by captains of Her Majesty's ships to admiralty in cases of collisions. To bring such a report within the rule of privilege it is only necessary that an affidavit be made by the proper officer of the admiralty. The rule on this subject is more fully stated as follows: "When any collision of importance occurs between one of Her Majesty's ships and any

¹⁰ *Wiedeman v. Walpole*, L. R. 24 Q. B. 537.

¹¹ *Swanston v. Lishman*, 4 Asp. (N. S.) 450.

¹² *Daniell v. Bond*, 3 L. T. N. S. 700.

¹³ *Don Francisco, The*, 6 L. T. N. S. 133.

¹⁴ *Kellock v. Home &c. Ins. Co.*, 12 Jur. N. S. 653.

¹⁵ *Rayner v. Ritson*, 6 B. & S. 888.

¹⁶ *Fraser v. Burrows*, L. R. 2 Q. B. 624.

other ship or vessel, it is the duty of the officer in command of Her Majesty's ship forthwith to report such collision to his senior officer or commander-in-chief, and of such senior officer or commander-in-chief to forward the same, with or without remarks as he may think fit, to the Lords Commissioners of the Admiralty. Such reports are designed solely for the information of the reporting officer's naval superior and the said Lords Commissioners of the Admiralty, and are in the nature of confidential communications. It will be prejudicial to the public service to allow such reports to become liable to inspection by litigants in any proceedings at law touching the matters therein reported."¹⁷ The principle was also stated in another case as follows: "We are of opinion that if the production of a state paper would be injurious to the public service, the general public interest must be considered paramount to the individual interests of a suitor in a court of justice. . . . It appears to us, therefore, that the question, whether the production of the document would be injurious to the public service, must be determined, not by the judge but by the head of the department having the custody of the paper, and if he is in attendance, and states that in his opinion, the production of the document would be injurious to the public service, we think the judge ought not to compel the production of it."¹⁸ Where an order to make discovery is made on the owners of foreign ships it is the rule that reasonable time be given for them to obey the order.¹⁹ A court will not make an order for inspection or discovery on the solicitors of a party. The court has no jurisdiction over solicitors for such a purpose.²⁰

§ 3289. Documents privileged.—The adverse party cannot be required to produce documents which are privileged. If he claims any document in his possession to be privileged he must so state in his affidavit, and must specify which, if any, of the documents referred to is the document he objects to producing, stating fully upon what grounds the objection is based, and as far as possible verify the facts upon which the objection is founded.²¹ It has been held that an affidavit is insufficient which merely states that the documents are privileged. The facts must be stated under oath on which the claim of privilege is made; these must be so stated that the court may de-

¹⁷ *Bellerophon*, H. M. S., 2 Asp. (N. S.) 449.

¹⁸ *Emma, The*, 3 Asp. (N. S.) 218.

¹⁹ *Cashin v. Craddock*, L. R. 2 Ch.

²⁰ *Beatson v. Skene*, 5 H. & N. 838, 29 L. J. Ex. 430.

²¹ Order XXXI, Rule 13.

CHAPTER CLXIII.

WAGES OF SEAMEN.

Sec.	Sec.
3292. Employment of officers and seamen.	3301. Discharge of seamen—Drunkenness.
3293. Contracts of seamen—Construction and burden of proof.	3302. Misconduct of master or mate.
3294. Contract for wages—Dissolution.	3303. Recovery of wages—Vessel unladen.
3295. Wages—Burden of proof.	3304. Time of unlading vessel—Presumption.
3296. Forfeiture of wages.	3305. Wages—Increase.
3297. Abandonment of vessel—Abandoned by officers.	3306. Loss of ship—Effect on wages.
3298. Charge of voyage—Justifies abandonment.	3307. Effect of desertion.
3299. Unseaworthiness—Effect, burden and presumption.	3308. Desertion—End of voyage.
3300. Discharge of seamen—Misconduct.	3309. Desertion and return.
	3310. Short allowance of provisions—Effect on wages.
	3311. Short allowance of provisions—Burden of proof.

§ 3292. **Employment of officers and seamen.**—The general and almost universal practice as well as the statutory requirement for the employment of either officers or seamen is a contract in writing, known as the ship's articles. And in an action by seamen for wages it is the duty of the master or owners of the vessel to produce these articles. But this method of employment is not exclusive and a verbal contract may be proved or it may be established from circumstances. Usually, however, such contract must be established by oral proof of express hiring or by the signing of the ship's articles. The employment of the master is too marked and notorious ordinarily to leave room for question, and when such employment is to be established by circumstantial evidence, in such case the evidence required should be of such a character as leaves no fair reason to doubt the fact, and it must go further and present a case equally consistent with the theory of a temporary engagement in part as a preparation

for a voyage, as with an appointment to sail in command of the vessel.¹

§ 3293. Contracts of seamen—Construction and burden of proof. As shown in the preceding section it is almost the universal practice that seamen before shipping are required to sign a contract as to wages; and such contract is designated by the general term shipping articles. These articles are ordinarily co-incident with the general principle of the maritime law in reference to the wages of seamen. Any change or interpolation in the shipping articles injurious to the rights of seamen and inuring to the benefit of the master or owner will be watched with scrupulous jealousy by the courts of admiralty; and they will be construed most favorably to the seamen, or where justice requires will be declared void. The reasons for this rule are thus stated by Judge Story: "Seamen are a class of persons remarkable for their rashness, thoughtlessness and improvidence. They are generally necessitous, ignorant of the nature and extent of their own rights and privileges, and for the most part incapable of duly appreciating their value. They combine, in a singular manner, the apparent anomalies of gallantry, extravagance, profusion in expenditure, indifference to the future, credulity, which is easily won, and confidence, which is readily surprised. Hence, it is that bargains between them and shipowners, the latter being persons of great intelligence and shrewdness in business, are deemed open to much observation and scrutiny; for they involve great inequality of knowledge, of forecast, of power, and of condition. Courts of Ad-

¹ Jones v. Davis, Abb. Adm. (U. S.) 446, 13 Fed. Cas. No. 7460; Moran v. Baudin, 2 Pet. Adm. (U. S.) 415, 17 Fed. Cas. No. 9785; United States v. Grace Lothrop, 95 U. S. 527; Atlantic, The, Abb. Adm. (U. S.) 451, 2 Fed. Cas. No. 620; City of Mexico, The, 7 Ben. (U. S.) 31, 5 Fed. Cas. No. 2756; Sarah Jane, The, Blatchf. & H. (U. S.) 401, 21 Fed. Cas. No. 12348; Page v. Sheffield, 2 Curt. (U. S.) 377, 18 Fed. Cas. No. 10667; Bryant, In re, Deady (U. S.) 118, 4 Fed. Cas. No. 2067; Osceola, The, Olc. (U. S.) 450, 18 Fed. Cas. No. 10602; Ianthe, The, 3 Ware (U. S.) 126, 12 Fed.

Cas. No. 6992; United States v. King, 23 Fed. 138; Christina, The, Deady (U. S.) 49; Jansen v. Theodor Heinrich, The, Crabbe (U. S.) 226, 13 Fed. Cas. No. 7215; Magee v. Moss, The, Gilp. (U. S.) 219, 16 Fed. Cas. No. 8944; Gem, The, 1 Low. (U. S.) 180, 10 Fed. Cas. No. 5304; Hermine, The, 3 Sawy. (U. S.) 80, 12 Fed. Cas. No. 6409; Brown v. Jones, 2 Gall. (U. S.) 477, 4 Fed. Cas. No. 2017; Burdett v. Williams, 27 Fed. 113; Minerva, The, 1 Hagg. Adm. 347; George Home, The, 1 Hagg. Adm. 370; Redmond v. Smith, 7 M. & G. 457, 49 E. C. L. 456.

miralty on this account are accustomed to consider seamen as peculiarly entitled to their protection so that they have been, by a somewhat bold figure, often said to be favorites of courts of admiralty. In a just sense they are so, so far as the maintenance of their rights, and the protection of their interests against the effect of the superior skill and shrewdness of masters and owners of ships are concerned."² Hence, where the shipping articles contain terms which are contrary to the general rights and privileges of seamen, the burden of proof is upon the master and shipowner to show that both the nature and operation of the stipulations were fully explained to the seamen, and that additional compensation was provided for entirely adequate to the new restrictions imposed.³ The general rule is that where there is any ambiguity, uncertainty or obscurity in the shipping articles the courts will adopt a construction most favorable to the seamen.⁴

§ 3294. Contract for wages—Dissolution.—The seamen's contract for wages is binding on both parties throughout the voyage or for the stipulated time. If it has been violated by the seaman in an action for wages he must show a sufficient excuse or justification for the breach. The contract may be dissolved (1) by the final abandonment of the vessel; (2) by a discharge from the master. It is the

² *Brown v. Lull*, 2 Sumn. (U. S.) 443, 449, 4 Fed. Cas. No. 2018; *Etna, The*, 1 Ware (U. S.) 474, 8 Fed. Cas. No. 4542; *Prince Frederick, The*, 2 Hagg. Adm. 394; *Minerva, The*, 1 Hagg. Adm. 347; *Brice v. Nancy, The, Bee* (U. S.) 429, 4 Fed. Cas. No. 1855; *Cadmus, The, v. Matthews*, 2 Paine (U. S.) 229, 4 Fed. Cas. No. 2282; *Kambira, The*, 100 Fed. 118; *Alice Blanchard, The*, 92 Fed. 519; *Two Fannys, The*, 25 Fed. 285; *Wope v. Hemenway*, 1 Sprague (U. S.) 300, 30 Fed. Cas. No. 18042; *Snow v. Wope*, 2 Curt. (U. S.) 301, 22 Fed. Cas. No. 13149; *Disco, The*, 2 Sawy. (U. S.) 474, 7 Fed. Cas. No. 3922; *Goodrich v. Domingo, The*, 1 Sawy. (U. S.) 182, 10 Fed. Cas. No. 5543; *Ada, The*, 2 Ware (U. S.) 408, 1 Fed. Cas. No. 38; *Jansen v. Theodor Heinrich, The, Crabbe* (U. S.)

226, 13 Fed. Cas. No. 7215; *Pioneer, The, Deady* (U. S.) 72, 19 Fed. Cas. No. 11177; *Hoghton, The*, 3 Hagg. Adm. 100; *Nonpareil, The*, 33 L. J. Adm. 201.

³ *Brown v. Lull*, 2 Sumn. (U. S.) 443, 4 Fed. Cas. No. 2018; *Almatia, The, Deady* (U. S.) 473, 1 Fed. Cas. No. 254; *Australia, The*, 3 Ware (U. S.) 240, 2 Fed. Cas. No. 667; *Sarah Jane, The, Blatchf. & H.* (U. S.) 401, 21 Fed. Cas. No. 12348; *Cypress, The, Blatchf. & H.* (U. S.) 83, 6 Fed. Cas. No. 3530; *Trecartin v. Rochambeau, The*, 2 Cliff. (U. S.) 465, 24 Fed. Cas. No. 14163; *Samuel Ober, The*, 15 Fed. 621; *San Marcos, The*, 27 Fed. 567.

⁴ *Jansen v. Theodor Heinrich, The, Crabbe* (U. S.) 226, 13 Fed. Cas. No. 7215; *Hoghton*, 3 Hagg. Adm. 100.

duty of seamen to do their utmost to save the ship and cargo and an abandonment of the vessel will not be justified until it is made to appear that such duty was faithfully performed. So, if the ship is wrecked or otherwise lost there may be an abandonment. And in the absence of fraud a discharge from the master is a sufficient justification. The burden of proving an abandonment which is relied upon to dissolve the contract is upon the seaman. Where the abandonment is shown to be in good faith for good cause, and the seamen are discharged by the act of the master, it is held that they may recover as salvors for services subsequently rendered in saving the cargo.⁵

§ 3295. Wages—Burden of proof.—Where by the terms of the shipping articles, the seamen shall not sue for wages until the vessel is unladen, in an action for wages by a seaman it was held that the burden was on the libelant to prove that the vessel was actually unladen at the time of filing the libel, or that it had been moored fifteen days or more.⁶ In such an action it has been held that the ship's articles were prima facie proof of the fact that the libelant was on board.⁷ And where seamen are discharged after the contract is duly executed, the burden is upon the ship to justify the discharge.⁸

§ 3296. Forfeiture of wages.—Notwithstanding the binding effect of the contract for wages, it is the recognized rule that a seaman may forfeit his wages. This forfeiture may be incurred in many ways, but the general rule is that wages are forfeited for gross offenses. "But it is not a single neglect of duty, or a single act of disobedience, which ordinarily carries with it so severe a penalty. There must be a case of high and aggravated neglect of disobedience, importing the most serious mischief, peril or wrong; a case calling for exemplary punishment, and admitting of no reasonable mitigation, a case involving a very gross breach of the stipulated contract for hire, and going, in its character and consequences to the very essence of its provisions."⁹ But ordinarily proof of a single neg-

⁵ *Warrior, The*, Lush. Adm. 476; *Varuna, The*, 1 Stuart Vice-Adm. (L. C.) 357; *Davis v. Leslie*, 1 Abb. Adm. (U. S.) 123, 7 Fed. Cas. No. 3639.

⁶ *Granon v. Hartshorne*, Blatchf. & H. (U. S.) 454, 10 Fed. Cas. No. 5689.

⁷ *Malone v. Bell*, 1 Pet. Adm. (U. S.) 139, 16 Fed. Cas. No. 8994.

⁸ *Villa Y Herman*, 101 Fed. 132.

⁹ *Mentor, The*, 4 Mason (U. S.) 84, 17 Fed. Cas. No. 9427; *Richard Matt, The*, 1 Biss. (U. S.) 440, 20 Fed. Cas. No. 11766; *Elizabeth Frith, The*, Blatchf. & H. (U. S.)

lect of duty, or a single act of disobedience will not subject the offender to a forfeiture of wages.¹⁰ In an action by the seamen for wages, proper service and good conduct are presumed until overcome by the owner of the vessel.¹¹ Mere neglect of duty of the mate is not sufficient to justify the forfeiture of wages, unless such neglect is followed by injurious consequences to the owner: the burden of proving such injurious results is upon the person setting it up.¹²

§ 3297. Abandonment of vessel—Abandoned by officers.—Where the owners have abandoned the vessel to the discretion of the captain, and she is assigned in trust, the seamen are justified in leaving the vessel and suing for their wages; and admiralty courts will entertain jurisdiction in such cases, although the seamen are foreigners and even where they had agreed in the shipping articles not to sue in foreign courts.¹³

§ 3298. Change of voyage—Justifies abandonment.—The shipping articles usually provide for the particular voyage and describe

195, 8 Fed. Cas. No. 4361; *Drysdale v. Ranger, The, Bee* (U. S.) 148, 7 Fed. Cas. No. 4097; *Olive Chamberlain, The, 1 Sprague* (U. S.) 9, 18 Fed. Cas. No. 10491; *Nimrod, The, 1 Ware* (U. S.) 9, 18 Fed. Cas. No. 10267; *Sprague v. Kain, Bee* (U. S.) 184, 22 Fed. Cas. No. 13250; *Childe Harold, The, Olc.* (U. S.) 275, 5 Fed. Cas. No. 2676; *Moslem, The, Olc.* (U. S.) 289, 17 Fed. Cas. No. 9875; *Alps, The, 19 Fed.* 139; *Smith v. J. C. King, The, 3 Fed.* 302; *Pacific, The, 23 Fed.* 154; *Occidental, The, 101 Fed.* 997; *Shawnee, The, 45 Fed.* 769; *Weatherpen v. Laidler, 8 Moo.* 37, 17 E. C. L. 534; *Countess of Harcourt, 1 Hagg. Adm.* 248; *Train v. Bennett, 3 Car. & P.* 3, 14 E. C. L. 420; *Susan, The, 2 Hagg. Adm.* 229 n.

¹⁰ *Mentor, The, 4 Mason* (U. S.) 84, 17 Fed. Cas. No. 9427; *Pioneer, The, Deady* (U. S.) 72, 19 Fed. Cas. No. 11177; *Almatia, The, Deady* (U. S.) 473, 1 Fed. Cas. No. 254; *Ben-*

ton v. Whitney, Crabbe (U. S.) 417, 3 Fed. Cas. No. 1335; *John Martin, The, Brown Adm.* (U. S.) 149, 13 Fed. Cas. No. 7358; *Magnet, The, Brown. Adm.* (U. S.) 547, 16 Fed. Cas. No. 8955; *Ealing Grove, The, 2 Hagg. Adm.* 15; *New Phoenix, The, 1 Hagg. Adm.* 198; *Malta, The, 2 Hagg. Adm.* 158; *Lady Campbell, 2 Hagg. Adm.* 14; *Gondolier, The, 3 Hagg. Adm.* 190; *Vibilia, The, 2 Hagg. Adm.* 228; *Blake, The, 1 W. Rob.* 73; *Lima, The, 3 Hagg. Adm.* 346.

¹¹ *Malta, The, 2 Hagg. Adm.* 158.

¹² *Duchess of Kent, The, 1 W. Rob.* 283; *Malta, The, 2 Hagg. Adm.* 158. See *Lima, The, 3 Hagg. Adm.* 346.

¹³ *Wilhelm Frederick, The, 1 Hagg. Adm.* 138; *Sigard v. Roberts, 3 Esp.* 71; *Limland v. Stephens, 3 Esp.* 269; *Bucker v. Klorkgeter, 1 Abb. Adm.* (U. S.) 402, 4 Fed. Cas. No. 2083. A collection of cases on the proposition that courts of admiralty will take jurisdiction in

it with reasonable certainty from the port of sailing to the various intermediate ports and the port of destination.¹⁴ The general rule is that deviation from the prescribed voyage will justify seamen in the abandonment of the vessel, and their wages become due immediately. But in this respect the ship's articles are not to be too strictly construed. It is not the rule that the least deviation from the designated voyage will invalidate the articles and discharge the seamen. The correct rule is that gross and unnecessary deviations will discharge the seamen and justify their abandonment of the vessel. Thus, where it was shown that after the vessel reached the port of destination and instead of returning the vessel was freighted to go elsewhere, it was held a sufficient justification for her abandonment by the mariners.¹⁵ But the mere putting into a port in order to make necessary repairs is not such a deviation as will discharge the seamen.¹⁶ In order to justify the abandonment the change of voyage must have in fact taken place, or it must have been actually determined upon by the master, of which determination the seamen had notice.¹⁷ The burden of proving a deviation sufficient to justify abandonment is upon the libellant.¹⁸

§ 3299. Unseaworthiness—Effect, burden and presumption.—It is a well-recognized rule in maritime law that unseaworthiness of a vessel justifies seamen in leaving the ship and entitles them to recover their wages.¹⁹ This rule is founded on the principle that it is

matters of controversy between foreigners in certain emergencies is found in 4 Fed. Cas. p. 559.

¹⁴ *Magee v. Moss, The, Gilp.* (U. S.) 219, 16 Fed. Cas. No. 8944; *Minerva, The*, 1 Hagg. Adm. 347, 361; *Westmorland, The*, 1 W. Rob. 216, 228; *Varuna, The*, 1 Stuart Vice-Adm. (L. C.) 357.

¹⁵ *Moran v. Baudin*, 2 Pet. Adm. (U. S.) 415, 17 Fed. Cas. No. 9785; *Potter v. Allin*, 2 Root (Conn.) 63; *Magee v. Moss, The, Gilp.* (U. S.) 219, 16 Fed. Cas. No. 8944; *Thorne v. White*, 1 Pet. Adm. (U. S.) 168, 23 Fed. Cas. No. 13989; *Crammer v. Fair American, The*, 1 Pet. Adm. (U. S.) 242, 6 Fed. Cas. No. 3347; *Hindman v. Shaw*, 2 Pet. Adm. (U.

S.) 264, 12 Fed. Cas. No. 6514; *Becherdass Ambaldass, The*, 1 Low. (U. S.) 569, 6 Am. L. Rev. 74, 3 Fed. Cas. No. 1203.

¹⁶ *Botker v. Towner*, 3 E. D. Smith (N. Y.) 132.

¹⁷ *Douglass v. Eyre, Gilp.* (U. S.) 147, 7 Fed. Cas. No. 4032.

¹⁸ *Botker v. Towner*, 3 E. D. Smith (N. Y.) 132.

¹⁹ *Bucker v. Klorkgeter*, 1 Abb. Adm. (U. S.) 402, 4 Fed. Cas. No. 2083; *Bray v. Atlanta, The, Bee* (U. S.) 48, 4 Fed. Cas. No. 1819; *United States v. Nye*, 2 Curt. (U. S.) 225, 27 Fed. Cas. No. 15906; *United States v. Ashton*, 2 Sumn. (U. S.) 13, 24 Fed. Cas. No. 14470; *United States v. Staly*, 1 Woodb. & M. (U.

the duty of the owner or the master to know that the vessel is seaworthy, and on the additional principle that seaworthiness is presumed.²⁰ It is also the rule that when the seamen quit the ship on account of its being unseaworthy and sue for wages the burden is upon the libelants to establish the fact of unseaworthiness or to overcome the legal presumption of seaworthiness. But where the libelants do this and assume this burden they are "entitled to every advantage that can arise from the clear establishment of that fact afterward, with the same effect as if it had been brought to light at the time of her sailing."²¹ Where seamen refuse to go to sea in a ship that is unseaworthy, or where they leave a vessel that is found to be leaking constantly and for no other cause than that she is dangerous or unseaworthy, such refusal to sail or such abandonment of the ship will not amount to a technical desertion.²²

§ 3300. Discharge of seaman—Misconduct.—That a seaman may be discharged for misconduct, or that he may forfeit his claim for wages on the ground of misconduct is essential to the safety of those engaged in navigation and to maintain the authority of persons in command of vessels. The causes which justify the master in dis-

S.) 338, 27 Fed. Cas. No. 16374; Dixon v. Cyrus, The, 2 Pet. Adm. (U. S.) 407, 7 Fed. Cas. No. 3930; Heroe, The, 21 Fed. 525; Turner v. Owen, 3 Fost. & F. 176; Hartley v. Ponsonby, 7 El. & Bl. 872, 90 E. C. L. 871; Hibernia, The, 1 Sprague (U. S.) 78, 12 Fed. Cas. No. 6455; United States v. Givings, 1 Sprague (U. S.) 75, 25 Fed. Cas. No. 15212; Nimrod, The, 1 Ware (U. S.) 9, 18 Fed. Cas. No. 10267; Shawnee, The, 45 Fed. 769; Moslem, The, Olc. (U. S.) 289, 17 Fed. Cas. No. 9875; Bucker v. Klorkgeter, Abb. Adm. (U. S.) 402, 4 Fed. Cas. No. 2083; Keating v. Pacific &c. Co., 21 Wash. 415, 58 Pac. 224; C. F. Sargent, The, 95 Fed. 179.

²⁰ United States v. Nye, 2 Curt. (U. S.) 225, 27 Fed. Cas. No. 15906; Work v. Leathers, 97 U. S. 379; Turner v. Owen, 3 Fost. & F. 176; Hedley v. Pinkney &c. Co., L. R.

(1892), 1 Q. B. 58; Dixon v. Cyrus, The, 2 Pet. Adm. (U. S.) 407, 7 Fed. Cas. No. 3930; Rice v. Polly and Kitty, The, 2 Pet. Adm. (U. S.) 420, 20 Fed. Cas. No. 11754; William Harris, The, 1 Ware (U. S.) 367, 29 Fed. Cas. No. 17695; Nimrod, The, 1 Ware (U. S.) 9, 18 Fed. Cas. No. 10267; Jay v. Allen, 1 Sprague (U. S.) 130, 13 Fed. Cas. No. 7235; Lizzie Frank, The, 31 Fed. 477; Noddleburn, The, 28 Fed. 855; La Fernier v. Soo River &c. Co., 129 Mich. 540, 89 N. W. 353; Couch v. Steel, 3 El. & Bl. 402, 77 E. C. L. 402.

²¹ Bucker v. Klorkgeter, 1 Abb. Adm. (U. S.) 402, 4 Fed. Cas. No. 2083; United States v. Nye, 2 Curt. (U. S.) 225, 27 Fed. Cas. No. 15906; Heroe, The, 21 Fed. 525.

²² Bucker v. Klorkgeter, 1 Abb. Adm. (U. S.) 402, 4 Fed. Cas. No. 2083.

charging his seamen before the termination of the voyage, or which amount to a forfeiture of wages "are such as amount to a disqualification and show him to be unfit for the services he has engaged for or unfit to be trusted in the vessel. They are: mutinous and rebellious conduct, persevered in; gross dishonesty or embezzlement; or where the seaman is habitually a stirrer up of quarrels, to the destruction of the order of the vessel and the discipline of the crew.²³ Ordinarily the master will not be justified in discharging a seaman for a single offense, unless it be of a very high and aggravated character, implying a deep degree of moral turpitude, or a dangerous and ungovernable temper or disposition. The law is more indulgent to the common seaman, in this respect, than in the case of the first or second officer of a vessel. It is a part of his duty to abstain from setting a bad example to the crew; he is supposed to appreciate the necessity of strict discipline and obedience on ship-board and his acts of disobedience and misconduct will naturally be punished with greater severity than that of the common seaman. But except in extreme cases courts of admiralty in their guardianship of the rights of seamen will punish even a mate or a master by deduction of wages or otherwise, rather than by forfeiture.²⁴ A seaman may be dis-

²³ *Smith v. Treat*, 2 Ware (U. S.) 270, 4 N. Y. Leg. Obs. 13, 22 Fed. Cas. No. 13117; *Cornelia Amsden, The*, 5 Ben. (U. S.) 315, 6 Fed. Cas. No. 3234; *Thorne v. White*, 1 Pet. Adm. (U. S.) 168, 23 Fed. Cas. No. 13989; *Sprague v. Kain*, Bee (U. S.) 184, 22 Fed. Cas. No. 13250; *Black v. Louisiana, The*, 2 Pet. Adm. (U. S.) 268, 3 Fed. Cas. No. 1461; *Drysdale v. Ranger, The*, Bee (U. S.) 148, 7 Fed. Cas. No. 4097; *Orne v. Townsend*, 4 Mason (U. S.) 541, 18 Fed. Cas. No. 10583; *Lady Campbell, The*, 2 Hagg. Adm. 5; *Vibilla, The*, 2 Hagg. Adm. 228; *Mentor, The*, 4 Mason (U. S.) 84, 17 Fed. Cas. No. 9427; *Johnson v. Cyane, The*, 1 Sawy. (U. S.) 150, 13 Fed. Cas. No. 7381; *Hutchinson v. Coombs*, 1 Ware (U. S.) 65, 12 Fed. Cas. No. 6955; *Idlehour, The*, 63 Fed. 1018; *Marsland v. Yosemite, The*, 18 Fed. 331; *El Dorado, The*,

1 Low. (U. S.) 289, 8 Fed. Cas. No. 4327; *Nimrod, The*, 1 Ware (U. S.) 9, 18 Fed. Cas. No. 10267; *Sherwood v. McIntosh*, 1 Ware (U. S.) 109, 21 Fed. Cas. No. 12778; *Bertha, The*, 111 Fed. 550; *T. F. Oakes, The*, 36 Fed. 442; *Superior, The*, 22 Fed. 927; *Jefferson Borden, The*, 6 Fed. 301; *Magnet, The*, Brown Adm. (U. S.) 547, 16 Fed. Cas. No. 8955; *Relf v. Maria, The*, 1 Pet. Adm. (U. S.) 186, 20 Fed. Cas. No. 11692; *Tios v. Radovich*, 10 La. Ann. 101, 63 Am. Dec. 592; *Buck v. Lane*, 12 S. & R. (Pa.) 266.

²⁴ *Cornelia Amsden, The*, 5 Ben. (U. S.) 315, 6 Fed. Cas. No. 3234; *Almatia, The*, Deady (U. S.) 473, 1 Fed. Cas. No. 254; *Maria, The*, Blatchf. & H. (U. S.) 331, 16 Fed. Cas. No. 9071; *Mentor, The*, 4 Mason (U. S.) 84, 17 Fed. Cas. No. 9427; *Black v. Louisiana, The*, 2 Pet. Adm. (U. S.) 268, 3 Fed. Cas.

charged on the grounds of disqualification or that he is an unsafe or unfit man to have on board the vessel.²⁵ Where a seaman is engaged under an entire contract and is wrongfully discharged, he is entitled to recover his wages during actual service.²⁶

§ 3301. Discharge of seaman—Drunkenness.—Habitual drunkenness may or may not be relied upon as a ground of forfeiture of seamen's wages. If relied upon as a defense in a libel by a seaman for his wages it must be specially pleaded and in such case the burden is upon the party making the allegation. There is no fixed or definite rule as to the forfeiture of wages on the ground of habitual drunkenness. The maritime law looks with great indulgence on the infirmities and temptations of the seaman, and it will not decree forfeiture for occasional offenses, but it prefers to inflict punishment by way of deduction in compensation rather than enforce the rigid and harsh rules of forfeiture. The rule as to the forfeiture of wages on account of drunkenness has been stated thus: "When it is habitual and gross, it may indeed be visited with a total forfeiture of wages; but where it is only occasional, or leaves much meritorious service behind, it is thought quite sufficient to recover, in damages, the amount of the actual or presumed loss, resulting from such a violation of the mariner's contract, and imperfect performance of duty. The maritime law is, in this, as in many other cases, founded on an indulgent consideration of human temptations and infirmities. It is not insensible to the perils and the hardships, the fatigue and the excitements, incident to the sea service; and it allows much for the habitual thoughtlessness, irregularity, and impetuosity, which, with much gallantry and humanity, is mixed up in the character of seamen. It deals out its forfeitures, therefore, with a sparing hand and aims to arrive at just and equitable results, not by enforcing rigid and harsh rules, but by moderating compensation as well as punishment, so as to apportion each to the nature and extent of the offense."²⁷

No. 1461; *Drysdale v. Ranger, The, Bee* (U. S.) 148, 7 Fed. Cas. No. 4097; *Relf v. Maria, The*, 1 Pet. Adm. (U. S.) 186, 20 Fed. Cas. No. 11692; *Thorne v. White*, 1 Pet. Adm. (U. S.) 168, 23 Fed. Cas. No. 13989; *Mentor, The*, 4 Mason (U. S.) 84, 17 Fed. Cas. No. 9427.

²⁵ *Hutchinson v. Coombs*, 1 Ware

(U. S.) 65, 12 Fed. Cas. No. 6955; *Smith v. Treat*, 2 Ware (U. S.) 270, 22 Fed. Cas. No. 13117; *Villa Y Herman, The*, 101 Fed. 132.

²⁶ *Frank C. Barker, The*, 19 Fed. 332; *Heroe, The*, 21 Fed. 525; *Progresso, The*, 46 Fed. 292; *Haveron v. Goelet*, 88 Fed. 301.

²⁷ *Orne v. Townsend*, 4 Mason (U.

§ 3302. **Misconduct of master or mate.**—The same rule applies to the master and to the mate as to common seamen. Where the master, throughout an entire voyage, shows utter incapacity, or, during such time has been continuously drunk, he will forfeit his wages. But where it appears that his misconduct was such that only a certain amount of damages was sustained such damages only should be deducted from the amount due him. But whether merely erroneous conduct, without intentional guilt, will subject the master to the forfeiture of his wages is a different question. Where the instructions were clear, positive and precise and there was proof of wilful disobedience, it might be sufficient to forfeit his wages, though no evil consequences actually resulted; but such could not be the case where the instructions were not clear and positive, and where it was made to appear that the master was not put in possession in the most intelligent form, of the real intention of the owners of the vessel, or where it was left to the master to exercise any judgment.²⁸

§ 3303. **Recovery of wages—Vessel unladen.**—By the terms of the statute the wages of seamen become due “as soon as the voyage is ended or the cargo or ballast be fully discharged at the last port of delivery.” Hence, in an action for the recovery of wages or to enforce a lien, the burden of proof is upon the libellant to show that the vessel has been discharged of her cargo. It is not sufficient to prove in such an action that the vessel had arrived at the port of destination, or that the vessel had been moored at the port for a certain time less than fifteen days. The duty of the seamen to continue with the vessel and aid in unloading her is, under the maritime law, regarded as incident to his hiring, and he is usually so bound by his articles.²⁹

§ 3304. **Time of unloading vessel—Presumption.**—Courts will carefully guard the rights of seamen after the termination of a voyage. Their wages will not be forfeited on the grounds of desertion be-

S.) 541, 18 Fed. Cas. No. 10583; Cornelia Amsden, The, 5 Ben. (U. S.) 315, 6 Fed. Cas. No. 3234; Sherwood v. McIntosh, 1 Ware (U. S.) 109, 21 Fed. Cas. No. 12778; Garnet, The, 3 Sawy. (U. S.) 350, 10 Fed. Cas. No. 5244; Duchess of Kent, The, 1 W. Rob. 283.

²⁸ Thomas Worthington, The, 3 W. Rob. 128, 12 Jur. 1057, 6 Notes of Cases 570.

²⁹ Martha, The, Blatchf. & H. (U. S.) 151, 16 Fed. Cas. No. 9144; Baltic Merchant, The, Edw. Adm. 86, 91; Granon v. Hartshorne, Blatchf. & H. 454, 10 Fed. Cas. No. 5689.

fore the ship is unladen if there has been an unreasonable delay in discharging the cargo. The statute in some instances has fixed a certain number of days for discharging the cargo of vessels. Where this statutory period of time has elapsed, in the absence of proof the courts will presume that sufficient time has been given for the discharge of the cargo and this presumption is sufficient to justify a recovery without proof that the vessel was in fact unladen.³⁰

§ 3305. Wages—Increase.—Where part of the seamen for any reason leave or desert a vessel in a foreign port and the master or captain then makes a new contract, without coercion, with the remaining sailors and promises to give extra compensation if they will continue to ship with the vessel for the remainder of the voyage with a diminished number of mariners, it has been held that the contract is valid and that the seamen may recover the additional compensation promised.³¹

§ 3306. Loss of ship—Effect on wages.—The old and the universal rule of maritime law was that in case of the wreck and loss of a ship on her voyage the seamen lost their entire wages.³² This rule was founded upon what was called an old figment of law to the effect that “freight is the mother of wages,” and that where no freight was earned no wages could be recovered.³³ This rule has been changed by the statute in England which provided that in all cases of the wreck or loss of the ship, every surviving seaman shall be entitled to his wages up to the period of the wreck or loss of the ship, whether such ship shall or shall not have previously earned freight; provided the seaman shall produce a certificate from the master or chief surviving officer of the ship, to the effect that he had exerted himself to the utmost to save the ship, cargo and stores.

³⁰ *Martha, The, Blatchf. & H.* (U. S.) 151, 16 Fed. Cas. No. 9144; *Granon v. Hartshorne, Blatchf. & H.* (U. S.) 454, 10 Fed. Cas. No. 5689; *Baltic Merchant, The, Edw. Adm.* 86, 91.

³¹ *Hartley v. Ponsonby*, 7 El. & Bl. 872, 90 E. C. L. 871; *Turner v. Owen*, 3 Fost. & F. 176; *Clutterbuck v. Coffin*, 3 M. & G. 842, 42 E. C. L. 438; but see, *Harris v. Carter*, 3 El. & Bl. 559, 77 E. C. L. 559.

³² *Adams v. Sophia, The, Gilp.* (U. S.) 77, 1 Fed. Cas. No. 65; *Davis v. Leslie, Abb. Adm.* (U. S.) 123, 7 Fed. Cas. No. 3639; *Neptune, The*, 1 Hagg. Adm. 227, 239.

³³ *Dunnett v. Tomhagen*, 3 Johns. (N. Y.) 154; *Lewis v. Elizabeth and Jane, The*, 1 Ware (U. S.) 41, 15 Fed. Cas. No. 8321; *Saratoga, The*, 2 Gall. (U. S.) 164, 6 Hall. L. J. 12, 21 Fed. Cas. No. 12355.

Under this statute the proof of the loss of the ship and the production of such a certificate would be sufficient to entitle the seaman to recover. But the question has arisen as to whether or not in case of loss of the ship's officers or their refusal to give such certificate the seaman can recover. Or, stating the proposition differently, is the production of the certificate a condition precedent to the right of recovery? This principle is fully covered in the opinion of district Judge Betts, where he says: "I do not think it imposes an absolute condition precedent to the right of recovery. It introduces no new requirement of duty to be performed by the seamen. The law maritime exacts of them the same diligence and fidelity of service throughout the whole period of their employment. Although the voyage may be uninterruptedly prosperous and safe, yet the mariner who, upon any occasion, from its inception to its close, shall refuse to exert himself to his utmost in the discharge of his duties on board, will either entirely forfeit his wages for the voyage, or become subject to damages or mulct in diminution of them. The proviso designates a mode of proof, which is the primary and highest evidence of the fact to be established, but secondary evidence is not excluded expressly, and the equitable and salutary purposes of a remedial and eminently beneficial statute will not be defeated by a construction which is strictly technical. The construction should be liberal, in order to give effect to the remedy.' The mode of proof designated is one over which those to be benefited by the provision have no control, nor is there any process furnished them to enforce the giving the certificate. It is the sole act of the master, and I think there is cogent for holding that, by the true import of the section, this important act of justice to mariners is not to be left to the master's discretion or to his interest or caprice; that it is his duty, in a case coming within the statute, to furnish the certificate, or to show satisfactory reasons for not doing so, otherwise the courts will accept other evidence as a legal substitute for the certificate, regarding the proviso as alike directory to the master and to the men."³⁴

§ 3307. Effect of desertion.—The general rules of maritime law on the subject of desertion were so uncertain and gave the master or owners of a vessel such discretionary powers in forfeiting the wages of seamen that the whole subject has been covered in the United States by statute. By such statutes absence from the vessel without

³⁴ *Davis v. Leslie*, Abb. Adm. (U. S.) 123, 7 Fed. Cas. No. 3639.

leave constitutes desertion, forfeits the wages earned, and removes all inquiry into the purpose or cause of such leaving. However, the law very reasonably allows the sailor forty-eight hours in which he may return to the vessel and forfeit three days' wages only for his misfeasance. The law requires that the absence of the seaman shall be entered on the log-book on the day that it occurred, and that the entry shall state the absence to be without leave. And it is the rule that no desertion can be established against a seaman except conformable to the statutory direction. Evidence of codes or usages of other nations which are conflicting or inconsistent with the statute is inadmissible to contradict or change the statutory rule.³⁵ It has been held that desertion or absence without leave must be noted in the log-book on the day it actually occurs, or it will not operate as a forfeiture of wages.³⁶ But some more recent cases under a different statute have held that the entry of the desertion in the log-book is not necessarily a condition of forfeiture of wages.³⁷

§ 3308. **Desertion—End of voyage.**—A desertion within the terms of the statute forfeits all claim to wages. But the proof must bring the act of desertion clearly within the statutory provision. According to the statute the desertion must have occurred during the continuance of the voyage and the voyage is held to terminate when the vessel arrives and is moored at her port of destination. The distinction must be maintained between a forfeiture of wages on the ground of desertion and the right of the seaman to recover his wages. The desertion which forfeits the wages must have occurred during the voyage; the voyage denotes the transit to be performed by the

³⁵ *Martha, The, Blatchf. & H. (U. S.)* 151, 16 Fed. Cas. No. 9144; *John Martin, The, 2 Abb. (U. S.)* 172, 13 Fed. Cas. No. 7357; *Cloutman v. Tunison, 1 Sumn. (U. S.)* 373, 5 Fed. Cas. No. 2907; *Herron v. Peggy, The, Bee (U. S.)* 57, 12 Fed. Cas. No. 6427; *Phoebe, The, v. Dignum, 1 Wash. (U. S.)* 48, 19 Fed. Cas. No. 11110; *Piehl v. Balchen, Olc. (U. S.)* 24, 19 Fed. Cas. No. 11137.

³⁶ *Phoebe, The, v. Dignum, 1 Wash. (U. S.)* 48, 19 Fed. Cas. No. 11110; *Douglass v. Eyre, Gilp. (U. S.)* 147, 7 Fed. Cas. No. 4032; *Knagg v. Goldsmith, Gilp. (U. S.)*

207, 14 Fed. Cas. No. 7872; *Martha, The, Blatchf. & H. (U. S.)* 151, 16 Fed. Cas. No. 9144; *Quintero, The, 1 Low. (U. S.)* 38, 20 Fed. Cas. No. 11517; *Sarah Jane, The, Blatchf. & H. (U. S.)* 401, 21 Fed. Cas. No. 12348; *Wood v. Nimrod, The, Gilp. (U. S.)* 83, 30 Fed. Cas. No. 17959; *Magee v. Moss, The, Gilp. (U. S.)* 219, 16 Fed. Cas. No. 8944.

³⁷ *Scott v. Rose, 2 Low. (U. S.)* 381, 21 Fed. Cas. No. 12545; *Welcome v. Yosemite, The, 18 Fed.* 383. See also, *Marjory Brown, The, 134 Fed.* 999. But compare *W. F. Babcock, The, 85 Fed.* 978.

seaman, and the term is used in this sense in marine law. His duties as mariner end when the vessel is moored at her port of destination; his labors after that are those of a stevedore or common laborer and he is required to perform this by reason of his contract or as an incident to the hiring. This labor of unlading the vessel must be performed before he can recover his wages. The penalty for failing to perform this labor is entirely different from that imposed by desertion. On these grounds it has been expressly held that a statutory desertion cannot be shown after the vessel has ended her voyage.³³ So, where a seaman becomes sick and is sent from the ship to a hospital in a foreign port, and the vessel leaves before the seaman is sufficiently recovered to join them, he cannot be regarded as absent without leave so as either to forfeit or stop his wages. The absence on account of sickness is presumed to be with leave.³⁹ Where a vessel attempts to invoke the statutory penalty for desertion it must prove such desertion according to the statutes.⁴⁰

§ 3309. Desertion and return.—As previously observed, desertion, that is, leaving the vessel with the intention of not returning, works a forfeiture of a seaman's wages. But if thereafter the seaman returns the law will not consider it as a case of total forfeiture, but rather as one for compensation and indemnity to the owners for the loss of such service; a seaman is punished and the owners sufficiently indemnified by a proper deduction from his wages. The law seeks to protect the seaman against the avarice and arrogance of the master and the vessel. This principle is thus stated: "The law looks with indulgence on the faults of seamen when they are free from malignity and arise from thoughtlessness, improvidence, and with

³³ *Martha, The, Blatchf. & H.* (U. S.) 151, 16 Fed. Cas. No. 9144; *Granon v. Hartshorne, Blachf. & H.* (U. S.) 454, 10 Fed. Cas. No. 5689; *Annie M. Smull, The, 2 Sawy.* (U. S.) 226, 1 Fed. Cas. No. 423; *Edward, The, Blatchf. & H.* (U. S.) 286, 8 Fed. Cas. No. 4289; *Elizabeth Frith, The, Blatchf. & H.* (U. S.) 195, 8 Fed. Cas. No. 4361; *Elizabeth, The, v. Rickers, 2 Paine* (U. S.) 291, 8 Fed. Cas. No. 4353; *Cloutman v. Tunison, 1 Sumn.* (U. S.) 373, 5 Fed. Cas. No. 2907; *Gifford v.*

Kollock, 3 Ware (U. S.) 45, 10 Fed. Cas. No. 5409; *Union, The, Blatchf. & H.* (U. S.) 545, 24 Fed. Cas. No. 14347; *Mary, The, 1 Ware* (U. S.) 454, 1 L. R. 157, 20 Am. Jur. 421, 16 Fed. Cas. No. 9191; *Edwards v. Susan, The, 1 Pet. Adm.* (U. S.) 165, 8 Fed. Cas. No. 4299; *Baltic Merchant, The, Edw. Adm.* 86.

³⁹ *Nevitt v. Clarke, Olc.* (U. S.) 316, 18 Fed. Cas. No. 10138.

⁴⁰ *John Martin, The, 2 Abb.* (U. S.) 172, 13 Fed. Cas. No. 7357.

want of consideration which is so characteristic of them as a class. In such cases it inflicts its penalties with gentleness and reluctance; and in so doing it will look to the conduct of the officers toward the men as well as make some allowances for the habitual improvidence of the men. And this it will especially do, when such conduct may in any way have tended to produce the fault which it has sought to punish."⁴¹

§ 3310. Short allowance of provisions—Effect on wages.—The statute gives a day's extra wages to the seaman for each day he is kept on short allowance. But it seems that recovery for the increase of wages can only be had where it is shown that the required quantity of provisions is not on board the vessel. The rule is that where the vessel is sufficiently supplied with stores the distribution is in the discretion of the master, and in such case the remedy for being put on short allowance must be by an action for damages.⁴² The master may justify himself for a failure to furnish the provisions required by law by showing his inability to procure the enumerated articles in foreign ports and by further showing that he did furnish as substitutes and equivalents other good and wholesome articles of food. He may also justify a short allowance by proof of diminished provisions on account of accidents, or on account of an unusually and unexpectedly prolonged voyage.⁴³ When the proof shows a short allowance of the three articles required by statute, the libelants are entitled to claim triple extra wages for each day of such short allowance.⁴⁴

§ 3311. Short allowance of provisions—Burden of proof.—The burden is on the libelants to show that the allowance was not in a

⁴¹ *Gifford v. Kollock*, 3 Ware (U. S.) 45, 19 L. R. 21, 10 Fed. Cas. No. 5409. No. 9086; *Mary, The*, 1 Ware (U. S.) 454, 1 L. R. 157, 20 Am. Jur. 421, 16 Fed. Cas. No. 9191; *Foster v. Sampson*, 1 Sprague (U. S.) 182, 9 Fed. Cas. No. 4982; *Mary Paulina, The*, 1 Sprague (U. S.) 45, 16 Fed. Cas. No. 9224; *Broux v. Ivy, The*, 62 Fed. 600; *Hermon, The*, 1 Low. (U. S.) 515, 12 Fed. Cas. No. 6411; *Coleman v. Harriet, The, Bee* (U. S.) 80, 6 Fed. Cas. No. 2982.

⁴² *Mariners v. Washington, The*, 1 Pet. Adm. (U. S.) 219, 16 Fed. Cas. No. 9086; *Childe Harold, The, Olc.* (U. S.) 275, 5 Fed. Cas. No. 2676; *Collins v. Wheeler*, 1 Sprague (U. S.) 188, 6 Fed. Cas. No. 3018; *H. E. Thompson, The v. Martin*, 16 App. Cas. (D. C.) 222. See, *Murray v. Ferry Boat*, 2 Fed. 86.

⁴³ *Mariners v. Washington, The*, 1 Pet. Adm. (U. S.) 219, 16 Fed. Cas. No. 3018.

reasonable amount, that it was not enough for the ordinary consumption of a man. There is no fixed rule as to what this reasonable amount is, but it has been held proper to take the amount of rations fixed by the statute in the army and navy, and that proof of an amount furnished to seamen equal to or less than two-thirds of the army rations was an insufficient allowance; and it was immaterial that some of the seamen did not consume the whole of the allowance where it further appeared that their savings were locked in their chests, as it was regarded a matter of prudence that they should practice, under the circumstances, the utmost frugality.⁴⁵ But in an action for such increased wages the rule is that where the proof shows that the libelants, the seamen, were put on short allowance, the burden is then on the master to prove that the vessel had on board the legal quantity of provisions, in order to bring himself within the construction of the statute.⁴⁶ But some district courts have held that the burden is on the libelants to prove both the service of the short allowance and that the vessel had an insufficient supply of provisions on board.⁴⁷

⁴⁵ *Mary, The*, 1 Ware (U. S.) 454, H. (U. S.) 195, 8 Fed. Cas. No. 4361; 1 L. R. 157, 20 Am. Jur. 421, 16 Fed. Cas. No. 9191; *John L. Dimmick, The*, 3 Ware (U. S.) 196, 9 Am. L. Reg. 224, 13 Fed. Cas. No. 7355. See, *Recovery, The*, 1 Stuart's Vice-Adm. (L. C.) 128.

Piehl v. Balchen, Olc. (U. S.) 24, 19 Fed. Cas. No. 11137.

⁴⁶ *Childe Harold, The, Olc.* (U. S.) 275, 5 Fed. Cas. No. 2676; *John L. Dimmick, The*, 3 Ware (U. S.) 196, 9 Am. L. Reg. 224, 13 Fed. Cas. No.

⁴⁷ *Elizabeth Frith, The, Blatchf. &* 7355.

CHAPTER CLXIV.

LOG-BOOK.

Sec.

3312. Prima facie evidence.

3313. Admissibility.

3314. Weight and competency.

3315. Conclusiveness.

Sec.

3316. Varied by parol.

3317. As evidence of desertion and wages.

§ 3312. **Log-book—Prima facie evidence.**—The log-book is a public document recognized in courts of admiralty.¹ It is required by law to be kept in certain classes of vessels, and in fact is universally found on board merchant vessels. The log-book is the journal of the voyage and is kept either by the master or the mate, and is a record of the transactions occurring on the vessel from day to day. In questions of prize and of average and of seamen's wages, and in some other particulars it is regarded as of the highest importance.² By the rules of law as well as of custom and usage the log-book should contain the facts relating to the business of lading, unlading and navigating the vessel, and the course, progress and incidents of the voyage, and the employment and conduct of the crew. The log-book is prima facie evidence of the truth of all matters properly entitled to be entered therein; the burden of proof is upon the party who denies the correctness of any proper entry to overcome this prima facie effect.³

§ 3313. **Admissibility.**—The log-book is admissible in evidence as any other document. Before it can be admitted as such it must be

¹ Rundle v. Beaumont, 4 Bing. 147, 7 Fed. Cas. No. 4032; Thompson v. Philadelphia, The, 1 Pet. 537; D'Israeli v. Jowett, 1 Esp. 427.

² Jacobs v. Sea Laws 7791; Malta, Adm. (U. S.) 210, 23 Fed. Cas. No. 13973; Knagg v. Goldsmith, Gilp. King, 4 Campb. 272; D'Israeli v. (U. S.) 207, 14 Fed. Cas. No. 7872; Jowett, 1 Esp. 427; Smallwood v. Hercules, The, 1 Sprague (U. S.) 534, 12 Fed. Cas. No. 6401; City of Mitchell, 2 Hayw. (N. Car.) 145.

³ Douglass v. Eyre, Gilp. (U. S.) Carlisle, The, 39 Fed. 807.

properly and sufficiently identified. The proof should show that it was the identical book kept on the vessel during a particular voyage. The mere notice by the adverse party to produce the log-book is not a sufficient identification, except for the party giving the notice. Nor is the name or title written or printed on the book a sufficient identification.⁴ It has been held a sufficient identification, however, where a witness testified that the bills for lading were made from the book and that in the opinion of the witness it was the particular log-book kept on the voyage, though he did not remember seeing the mate make regular entries in it, and where it further appeared that the mate could not be found.⁵

§ 3314. Weight and competency.—The courts are not uniform on the proposition as to whether the log-book is evidence in favor of the vessel or of the person by whom it was kept. It has been held that it could not be so used by a party in his favor.⁶ On the question of the competency and weight of the log-book as evidence Sir William Scott said: "I must observe, that the evidence of the log-book is to be received with jealousy where it makes for the parties, as it may have manufactures for the purpose; but it is evidence of the most authentic kind against the parties, because they cannot be supposed to have given a false representation with a view to prejudice themselves. The witnesses, when they speak to a fact, may perhaps be aware, that it has become a point of consequence, and may qualify their account of past events so as to give colourable effect to it. But the journal is written beforehand, and by persons unacquainted, perhaps, with any intention of fraud, and may therefore be securely relied on wherever it speaks to the prejudice of its authors."⁷ And it has been held that a captain of a vessel testifying as a witness may refresh his recollection by reference to the log-book.⁸ Judge Story said: "But I am yet to learn that parties can thus create evidence for themselves by inserting facts in a log-book."⁹ But in some in-

⁴ *United States v. Mitchell*, 2 Wash. (U. S.) 478, 26 Fed. Cas. No. 15791.

⁵ *United States v. Mitchell*, 3 Wash. (U. S.) 95, 26 Fed. Cas. No. 15792.

⁶ *Sociedade Feliz, The*, 1 W. Rob. 303, 311; *Henry Coxon, The*, L. R. 3 P. D. 156, 4 Asp. 18; *Price v. Earl of Torrington*, 1 Salk. 285.

⁷ *Eleanor, The*, Edw. Adm. 135, 163; *L'Etolle, The*, 2 Dods. 106, 113; *Constitution, The*, 10 Jur. (N. S.) 831. See also, *Lamington, The*, 87 Fed. 752; *Newfoundland, The*, 89 Fed. 510.

⁸ *Anderson v. Whalley*, 3 Car. & Kir. 54.

⁹ *United States v. Gibert*, 2 Sumn. (U. S.) 19, 79, 25 Fed. Cas. No.

stances it has been held that the entry in the log-book is indispensable.¹⁰ The competency of the log-book is governed by the *lex fori* and the rule in the British merchants' shipping act cannot control the admission of the log in courts in the United States.¹¹

§ 3315. Conclusiveness.—The rule that the log-book is not conclusive evidence of the facts therein stated is universally conceded. The statute which requires certain things to be stated in the log-book as a condition of its admissibility does not make it conclusive on such matters.¹² It has been held that the log is conclusive against the person making it in the absence of conclusive evidence showing a mistake. This rule was thus stated by a district judge: "The log being intended to be a correct record of the facts contained therein, and entry made with full knowledge and opportunity of ascertaining the truth must be accepted as the truth if it tells against the party making it, and can be denied no more than a deed. If it is the result of a mistake there must be conclusive evidence of the mistake."¹³

§ 3316. Varied by parol.—In the cases where the log-book is made conclusive by statute on the showing required it is binding and cannot be varied or controlled. But the general rule is that the entries in a log-book may be varied or controlled by parol evidence; or, the rule is sometimes stated that parol evidence is admissible to falsify the entries in a log-book.¹⁴ So parol evidence is proper either to

15204; *United States v. Sharp*, Pet. (C. C.) 118, 27 Fed. Cas. No. 16264.

¹⁰ *Knagg v. Goldsmith*, Gilp. (U. S.) 207, 14 Fed. Cas. No. 7872; *Malone v. Bell*, 1 Pet. Adm. (U. S.) 139, 16 Fed. Cas. No. 8994; *Hercules, The*, 1 Sprague (U. S.) 534, 12 Fed. Cas. No. 6401.

¹¹ *City of Carlisle, The*, 39 Fed. 807.

¹² *United States v. Gilbert*, 2 Sumn. (U. S.) 19, 25 Fed. Cas. No. 15204; *Jones v. Phoenix, The*, 1 Pet. Adm. (U. S.) 201, 13 Fed. Cas. No. 7489; *Rovena, The*, 1 Ware (U. S.) 309, 20 Fed. Cas. No. 12090; *Hercules, The*, 1 Sprague (U. S.) 534, 12 Fed. Cas. No. 6401; *Orne v.*

Townsend, 4 Mason (U. S.) 541, 547, 18 Fed. Cas. No. 10583.

¹³ *Newfoundland, The*, 89 Fed. 510; *Bewge v. Utopia, The*, 1 Fed. 892.

¹⁴ *Orne v. Townsend*, 4 Mason (U. S.) 541, 547, 18 Fed. Cas. No. 10583; *Malone v. Bell*, 1 Pet. Adm. (U. S.) 139, 16 Fed. Cas. No. 8994; *Whitton v. Commerce, The*, 1 Pet. Adm. (U. S.) 160, 29 Fed. Cas. No. 17604; *Jones v. Phoenix, The*, 1 Pet. Adm. (U. S.) 201, 13 Fed. Cas. No. 7489; *Worth v. Mumford*, 1 Hilt. (N. Y.) 1; *Hercules, The*, Sprague (U. S.) 534, 12 Fed. Cas. No. 6401; *Sarah Jane, The*, Blatchf. & H. (U. S.) 401, 21 Fed. Cas. No. 12348.

impeach the log or to show that matters have been interpolated therein, or that the entry was not made on the day on which it purports to have been made.¹⁵

§ 3317. As evidence of desertion and wages.—The United States statutes make the log-book evidence in matters of desertion and the wages of seamen. On an interpretation of these statutes it has been held that the log-book is not admissible as to any fact other than as required by the statute.¹⁶ The statute requires the entry of the occurrence to be made in the log-book on the day on which it actually transpired. The statute must be strictly complied with in order to render the log-book admissible. This principle was stated by a district judge as follows: "One-half of the attempts of masters to bar seamen of the recovery of their wages, which have passed under the observation of this court, are founded not directly upon the act of misconduct alleged, but are excited by some after occurrence, as a prosecution for wages or for assault and battery, or by some irritation of personal feelings on the part of the master or his officers, under the influence of which the master seeks to give to all preceding misconduct of his men the most odious colorings, and to demand a forfeiture of wages for alleged desertions not denounced as such at the time they occurred. The courts, therefore, for the protection of seamen, exact from the master the most rigid compliance with the requisitions of the act in this behalf."¹⁷ In some instances, as already shown, the statute provides that an entry of the occurrence shall be made in the official log-book on the same day; that in any subsequent legal proceedings the entry therein shall be produced or proved; and that, in default thereof, the court may decline to receive evidence of the offense. In a recent case, however, it was held that a

¹⁵ *Worth v. Mumford*, 1 Hilt. (N. Y.) 1.

¹⁶ *Jones v. Phoenix, The*, 1 Pet. Adm. (U. S.) 201, 13 Fed. Cas. No. 7489; *United States v. Gilbert*, 2 Sumn. (U. S.) 19, 25 Fed. Cas. No. 15204.

¹⁷ *Martha, The*, 1 Blatchf. & H. (U. S.) 151, 16 Fed. Cas. No. 9144; *Malone v. Bell*, 1 Pet. Adm. (U. S.) 139, 16 Fed. Cas. No. 8994; *Jones v. Phoenix, The*, 1 Pet. Adm. (U. S.) 201, 13 Fed. Cas. No. 7489; *Herron*

v. Peggy, The, Bee (U. S.) 57, 12 Fed. Cas. No. 6427; *Phoebe, The, v. Dignum*, 1 Wash. (U. S.) 48, 19 Fed. Cas. No. 11110; *Knagg v. Goldsmith, Gilp.* (U. S.) 207, 14 Fed. Cas. No. 7872; *Douglass v. Eyre, Gilp.* (U. S.) 147, 152, 7 Fed. Cas. No. 4032; *Cloutman v. Tunison*, 1 Story (U. S.) 373, 5 Fed. Cas. No. 2907; *Mary C. Conery, The*, 9 Fed. 222; *Worth v. Mumford*, 1 Hilt. (N. Y.) 1.

deduction from wages on account of time lost by drunkenness was justified although there was no entry of the occurrence in any log-book, and that the court in its discretion might receive other evidence, especially as the vessel was a small coasting vessel such as seldom keeps a log, and the seaman's claim was clearly unjust and without merit.¹⁸

¹⁸ *Marjory Brown, The*, 134 Fed. 999.

CHAPTER CLXV.

PRIZE CASES.

- | Sec. | Sec. |
|---|---|
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| 3319. Jurisdiction in prize cases. | 3336. Further proof allowed in joint or collusive captures. |
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§ 3318. **Prize cases—Practice.**—Prize cases form an important part of the practice in admiralty courts. It is not within the scope of this work, however, to state the rules of practice generally. But an understanding of the nature of some of the features of prize cases will aid in the application of the rules of proof in such cases. The court of prize is regarded as a court of the law of nations and takes neither its character nor its rules from the mere local municipal regulations of any country. In such causes in these courts the entire proceedings including the pleadings and the proofs in a general way follow the civil law, with such changes and additions as the rules of

practice of modern civilized nations, together with the rights of belligerents and neutrals, have necessarily added.¹

§ 3319. Jurisdiction in prize cases.—The rule has been established that the jurisdiction in cases of capture and questions of prize belongs exclusively to the courts of the country of the captors, in the absence of proof of violations of the rules of neutrality. This rule, together with the reasons therefor, was stated by Justice Livingstone in an early case as follows: “Not only is it a rule well established by the customary and conventional law of nations, but it is founded in good sense, and is the only one which is salutary and safe in practice. It secures to a belligerent the independence to which every sovereign state is entitled, and which would be somewhat abridged, were he to condescend so far as to permit those who bear his commission to appear before the tribunals of any other country, and submit to their interpretation or control, the orders and instructions under which they have acted. It insures also, not only to the belligerent himself, but to the world at large, a great decree of caution and responsibility, on the part of the agents whom he appoints; who not only give security to him for their good behavior, but will sometimes be checked in a lawless career, by the consideration that their conduct is to be investigated by the courts of their own nation, and under the very eye of the sovereign, under whose sanction they are committing hostilities. In this way, also, is a foundation laid for a claim by other nations, of an indemnity against the belligerent, for the injuries which their subjects may sustain, by the operation of any unjust or improper rules, which he may think proper to prescribe for those who act under his authority.”²

§ 3320. Jurisdiction and relief.—When a court of admiralty has assumed legitimate jurisdiction over property of prize its authority will extend and will be exerted over all the incidents. Thus, in such a case the court, if the evidence justifies, may decree a restoration of

¹ *Adeline, The*, 9 Cranch (U. S.) 244, 284; *Thirty Hogsheads of Sugar v. Boyle*, 9 Cranch (U. S.) 191; *Manila Prize Cases*, 188 U. S. 254, 23 Sup. Ct. 415. For valuable notes on the practice in prize causes see Appendix 2 Wheat 1.

298; *L'Invincible*, 1 Wheat (U. S.) 238. See, *Bee, The*, 1 Ware (U. S.) 332, 336, 3 Fed. Cas. No. 1219; *William, The*, 1 Pet. Adm. (U. S.) 12; *Santissima Trinidad, The*, 7 Wheat (U. S.) 283; *South Carolina, The*, *Bee* (U. S.) 422.

² *Estrella, The*, 4 Wheat (U. S.)

a whole or a part of the property; it may not only burden the property with salvage but may determine whether such salvage be held a portion of the property itself or a mere lien, or a condition annexed to its restitution.³ Before an order of restitution can be made for prize property the claimant or the asserted owner must establish two propositions: (1) His proprietary interest in the captured goods; (2) that he is a neutral merchant and by reason of his domicile and national character is entitled to a restitution of the property.⁴ Where it was made to appear that the property captured was the produce of land in an enemy's country, it was held to be prize property regardless either of the national character of the owner or his place of residence.⁵

§ 3321. **Capture in neutral territory, effect.**—A capture in neutral waters is not necessarily void. As between the belligerent nations such captures are regarded as rightful. It is only considered void as to the neutral sovereign and it is only by him that the legal validity can be raised or questioned. It does not rest with the enemy to claim the illegality of the capture; he has no rights whatever in the premises. If the neutral sovereign fails or refuses to interfere by way of protection the property may be condemned to the captors.⁶ This principle was recognized in a more recent case growing out of a capture during the civil war in Mexican waters, and the rule stated thus: "The weight of evidence, we think, put the vessel, at the time of capture, in Mexican waters; but if the ship or cargo was enemy property, or either was otherwise liable to condemnation, that circumstance, by itself, would not avail the claimants in a prize court. It might constitute a ground of claim by the neutral power, whose territory had suffered trespass, for apology or indem-

³ *Adeline, The*, 9 Cranch (U. S.) 244; *Anna Maria, The*, 2 Wheat. (U. S.) 327; *Del Col v. Arnold*, 3 Dall. (U. S.) 333; *Two Friends, The*, 1 C. Rob. 271; *Copenhagen, The*, 1 C. Rob. 289; *Bingham v. Cabot*, 3 Dall. (U. S.) 19; *United States v. Peters*, 3 Dall. (U. S.) 121; *Talbot v. Jansen*, 3 Dall. (U. S.) 133; *Betsy, The*, 1 C. Rob. 332; *Princessa, The*, 2 C. Rob. 31; *St. Juan Baptista, The*, 5 Rob. 33; *Fire Damer, Die*, 5 Rob. 357; *Louis, The*, 5 Rob. 146; *Po-*

mona, The, 1 Dods. 25; *Herkimer, The*, Stew. N. Sc. 128, 2 Hall L. J. 133; *Home v. Camden*, 2 H. Bl. 533; *Smart v. Wolff*, 3 Term. R. 323; *Duckworth v. Tucker*, 2 Taunt. 7; *Le Caux v. Eden*, 2 Doug. 594; *Lindo v. Rodney*, 2 Doug. 613n.

⁴ *Dos Hermanos, The*, 2 Wheat. (U. S.) 76.

⁵ *Thirty Hogsheads of Sugar v. Boyle*, 9 Cranch (U. S.) 191.

⁶ *Anne, The*, 3 Wheat. (U. S.) 435.

nity. But neither an enemy nor a neutral, acting the part of an enemy, can demand restitution of captured property on the sole ground of capture in neutral waters.”⁷

§ 3322. Neutral protection—Proof and effect.—The defense of neutrality on the part of the captured or the claimant must be consistent. In order to sustain it the proof must show, in addition to neutrality of the owner or claimant, that the capture was made in neutral waters and without resistance. A ship in neutral waters is bound to abstain from all hostilities; and failing to do this she forfeits protection from the neutral sovereign. This principle is more fully stated as follows: “It is a fact, that the captured ship first commenced hostilities against the privateer. This is admitted on all sides; and it is no excuse to assert that it was done under a mistake of the national character of the privateer even if this were entirely made out in the evidence. While the ship was lying in neutral waters, she was bound to abstain from all hostilities, except in self-defense. The privateer had an equal title with herself to the neutral protection, and was in no default, in approaching the coast, without showing her national character. It was a violation of that neutrality which the captured ship was bound to observe, to commence hostilities, for any purpose, in these waters; for no vessel coming thither was bound to submit to search, or to account to her for her conduct or character. When, therefore, she commenced hostilities, she forfeited the neutral protection, and the capture was no injury for which any redress could be rightfully sought from the neutral sovereign.”⁸ It seems to be the settled rule of prize courts that the burden of proof of a neutral interest is upon the claimants. In speaking of this rule in a case where time had been given for the proof to establish the neutrality, Justice Story said: “But if, in the event, after full time and opportunity to adduce proofs, the claim is still left in uncertainty and the neutrality of the property is not established, beyond reasonable doubt, it is the invariable rule of prize courts to reject the claim and decree condemnation of the property.”⁹

§ 3323. Presumptions in prize cases.—Certain presumptions arise in prize courts which legally affect the parties, and are considered as

⁷ *Sir William Peel, The*, 5 Wall. (U. S.) 517.

⁸ *Amiable Isabella, The*, 6 Wheat. (U. S.) 177.

⁹ *Anne, The*, 3 Wheat. (U. S.) 435.

of general application. Thus, where there is a total want of evidence to establish the proprietary interest, the property is presumed to belong to an enemy.¹⁰ So, possession is presumptive evidence of property.¹¹ And goods found in an enemy's ship are presumed to belong to the enemy in the absence of documentary proof accompanying them, giving them a distinct neutral character.¹² So, a merchant is presumed to be acting for himself and upon his own account.¹³ So, where it appears that a ship has been captured and carried into an enemy's port and is thereafter found in the possession of a neutral, the presumption is that there has been regular condemnation, and proof of the contrary rests upon the party claiming the property against the neutral officer.¹⁴ So, the master and crew of a ship are presumed to possess the national character of the ship to which they belong during the time of their employment.¹⁵ And a neutral consul, who has become a resident and a trader in a belligerent country, is, as to his mercantile character, presumed a belligerent of that country.¹⁶ And a like presumption applies to the subject of one belligerent country who resides in the country of the enemy and carries on trade there.¹⁷ Ships are conclusively presumed to belong to the country under whose flag and pass they sail.¹⁸ And where it was clear that a vessel was the property of an enemy and liable to confiscation, the presumption is that the cargo was the property and also subject to condemnation.¹⁹ So, a vessel is presumed to belong to the country where the owner resides.²⁰ So, impliments and munitions of war which are calculated for immediate use for warlike purposes when in transit to the enemy's country are presumed to be

¹⁰ *Magnus, The*, 1 C. Rob. 31.

¹¹ *Resolution, The*, Dall. (U. S.) 19.

¹² *Flying Fish, The*, 2 Gall. (U. S.) 373, 9 Fed. Cas. No. 4892; *San Jose Indiano, The*, 2 Gall. (U. S.) 268, 21 Fed. Cas. No. 12322; *London Packet, The*, 1 Mason (U. S.) 14, 15 Fed. Cas. No. 8474.

¹³ *Jonge Pieter, The*, 4 C. Rob. 79.

¹⁴ *Countess of Lauderdale, The*, 4 C. Rob. 283.

¹⁵ *Embden, The*, 1 C. Rob. 16; *Endraught, The*, 1 C. Rob. 19; *Bernon, The*, 1 C. Rob. 102; *Frederick, The*, 5 C. Rob. 8; *Ann*, 1 Dods. 221.

¹⁶ *Indian Chief, The*, 3 C. Rob. 22; *Josephine, The*, 4 C. Rob. 25.

¹⁷ *Citto, The*, 3 C. Rob. 38; *McConnell v. Hector*, 3 Bos. & P. 113.

¹⁸ *Vigilantia, The*, 1 C. Rob. 1; *Vrow Anna Catharina*, 5 C. Rob. 161; *Success*, 1 Dods. 131; *Julia, The*, 2 Sprague (U. S.) 164, 14 Fed. Cas. No. 7576; *London Packet, The*, 5 Wheat. (U. S.) 132; *Sally Magee, The*, 3 Wall. (U. S.) 451; *Carlos F. Roses, The*, 177 U. S. 655, 20 Sup. Ct. 803; *Appendix*, 2 Wheat. (U. S.) 24; *Benito Estenger, The*, 176 U. S. 568, 20 Sup. Ct. 458; *Flying Fish, The*, 2 Gall. (U. S.) 373, 9 Fed. Cas. No. 4892.

¹⁹ *San Jose Indiano, The*, 2 Gall. (U. S.) 268, 21 Fed. Cas. No. 12322.

contraband of war.²¹ In the absence of the ship's papers the presumption is that the destination of the vessel was to some port of the country where the consignee lived.²²

§ 3324. **Presumption as to blockade.**—It is one of the rules of recognized warfare that one of the belligerents has the right to blockade the ports of another. From this it follows as a corollary that neutrals are bound to respect such a blockade in order to claim their privilege as neutrals. A state of war must actually exist and the neutral must have notice or knowledge of the intention of one belligerent to blockade the ports of the other in order to justify the capture of the neutral vessels, and the neutrals may call in question the existence of the blockade and challenge the authority of the party who has established it. Such neutral vessels are entitled to reasonable time in which to leave the port after notice or knowledge of the blockade. Neutral vessels in a blockaded port are presumed to have notice of the blockade as soon as it commences.²³ Where it was shown that a vessel delayed sailing after being completely laden, and that after she sailed she changed course in order to escape a ship of war cruising for blockade runners, it was held that from these facts the intent to run the blockade would be presumed.²⁴ The rule is that a blockade once established and notice duly given will be presumed to continue until notice of discontinuance.²⁵ So, intention to break the blockade may be presumed from the position of the ship when captured; and concealment of the truth is held to be *prima facie* evidence of such fraudulent intention.²⁶ Where a prohibited cargo was taken at a port with which commerce had been prohibited, and in the absence of the ship's papers, it will be presumed that the cargo was laden for an unlawful destination.²⁷

²¹ *Peterhoff, The*, Blatchf. Pr. Cas. 463, 19 Fed. Cas. No. 11024.

²² *United States v. Paul Shearman*, Pet. (C. C.) 98, 27 Fed. Cas. No. 16012.

²³ *Prize Cases, The*, 2 Black (U. S.) 635.

²⁴ *Balgory, The*, 2 Wall. (U. S.) 474; *Cornelius, The*, 3 Wall. (U. S.) 214; *Aurora, The*, 8 Cranch (U. S.) 203; *Jenny, The*, 5 Wall. (U. S.) 183.

²⁵ *Balgory, The*, 2 Wall. (U. S.) 474.

²⁶ *Cheshire, The*, 3 Wall. (U. S.) 231; *James Cook, The*, Edw. Adm. 261; *Sunbeam, The*, Blatchf. Pr. Cas. 316, 23 Fed. Cas. No. 13613; *Adula, The*, 89 Fed. 351.

²⁷ *United States v. Paul Shearman*, Pet. (C. C.) 98, 27 Fed. Cas. No. 16012.

§ 3325. **Prima facie evidence.**—The term prize goods or property is applied to such goods as are taken on the high seas from an enemy in time of war. When any property is thus taken it is the duty of the captors to proceed against the goods as belligerent property in a prize court. No other court has jurisdiction; nor can the questions presented on a capture made in a time of war be properly or effectually examined except in a prize court. The general rule is that property found in possession of the enemy affords prima facie proof that it belongs to him. This rule is not affected by the fact that such property may have previously possessed a neutral or friendly character, but it is held that such neutral or friendly owner is deprived of his right to claim the property if it has been changed by a sentence of condemnation, or by such possession as nations recognize as firm and effectual.²⁸

§ 3326. **Burden of proof.**—The rule that the sea is open to all nations does not necessarily apply during a state of war between two nations. In such times the ships of either nations are subject to capture as lawful prize by the ships of the other. But every capture must be made upon just grounds; hence, while neutral ships, or vessels of nations not enemies in time of war may be brought to and examined, they are not subject to capture unless shown to be aiding the enemy or otherwise violating the laws of neutrality. It is, therefore, evident that every capture is at the peril of the vessel making it. From these principles is deduced the rule that the burden of proof is upon the captor to show that the captured vessel was a lawful prize; the claimants are not required to establish their innocence or their neutrality, in the first instance. To entitle the captors to a judgment of condemnation they must establish affirmatively: (1) Just grounds for the capture; if this amounts to probable cause, it is sufficient; (2) the vessel must be shown to be the property of the enemy.²⁹ So, a party that founds a claim on the rights of war has the burden of proving that peace was broken and that a state of war actually existed.³⁰

²⁸ *Adeline, The*, 9 Cranch (U. S.) 244, 285.

²⁹ *Resolution, The*, 2 Dall. (U. S.) 19; *Thomas Watson, The*, Blatchf. Pr. Cas. 120, 23 Fed. Cas. No. 13933; *United States v. Open Boat*, 5 Ma-

son 232, 27 Fed. Cas. No. 15968; *Peterhoff, The*, Blatchf. Pr. Cas. 463, 19 Fed. Cas. No. 11024.

³⁰ *Resolution, The*, 2 Dall. (U. S.) 19.

§ 3327. **Burden on claimant.**—There may be cases where certain circumstances exist and certain presumptions arise which will cast the burden of proof upon the claimant. Thus, if the ship's papers show the captured vessel to be the property of the enemy, a sufficient *prima facie* case is thus made to cast upon the claimants the burden of proving ownership of the property.³¹ The rule is that in prize cases the burden of proving neutral ownership of a vessel is on the claimant.³² So, where a cargo is found in the ship of an enemy the burden of relieving such cargo from a judgment of condemnation, and of proving ownership rests upon the claimants.³³ And the burden of proof to repel the presumption of an enemy's license is on the claimant.³⁴

§ 3328. **Burden on claimant—General rule.**—The general rule that prevails in the matter of burden of proof in prize cases is that where the vessel or the property is captured or taken in delicto, the burden of proof is upon the vessel or the claimant to establish its innocence or neutrality and avoid an order of condemnation.³⁵ The general rule as to the burden of proof in prize cases is thus stated: "The burden of proof in prize proceedings is on the seized vessel. The authorities concur in this general statement, but the principle is not technical and is not to be pushed beyond its proper natural intent. Seized vessels always appear before the court under the taint of suspicion; that taint it is incumbent upon them to remove, as it is in their power alone to do so. What the court looks for is the fact. If it appear that the vessel was innocently pursuing an honest and legal voyage, whether that appear by papers or otherwise, then the vessel should be released. No particular papers, no specified character of evidence is marked out and defined as indispensable to attain this end. A case is easily supposable in which a merchant vessel has lost its papers by an accident, or by theft, or by robbery committed by a pirate or privateer, or through suppression by the captor, and it would not be admitted—the fact of their non-production being explained, and the vessel's honest character being shown—that be-

³¹ *Resolution, The*, 2 Dall. (U. S.) 19. 177 U. S. 655, 20 Sup. Ct. 803; *Sally Magee, The*, 3 Wall. (U. S.) 451.

³² *Benito Estenger, The*, 176 U. S. 568, 20 Sup. Ct. 489.

³³ *Langdon Cheves, The*, 4 Wheat. (U. S.) 103.

³⁴ *London Packet, The*, 5 Wheat. (U. S.) 132; *Carlos F. Roses, The*,

³⁵ *United States v. Paul Shearman, Pet.* (C. C.) 98, 27 Fed. Cas. No. 16012.

cause some particular document was not on board she therefore should be condemned and confiscated. The onus probandi is on the captured vessel; which means no more than that she must explain away suspicious circumstances."³⁶

§ 3329. Burden on claimant—Illustrations.—Where by statute it was made illegal to import goods from a British port except in neutral vessels, it was held that when the prohibited importation was shown the burden of proof was then on the claimant to establish the neutral character of the vessel.³⁷ The burden is on the claimant to overcome the *prima facie* case; and where he fails to do this by the production of papers and other evidence which must be in his possession or under his control, the order of condemnation will follow.³⁸ Where a capture is made on account of the violation of the embargo laws, the burden is upon the captured vessel to show the necessity sufficient to excuse such a violation, and the evidence for this purpose must be clear and positive.³⁹ It seems to be the rule of prize courts that the burden of proof of a neutral interest rests on the claimant; but this is subject to the rule that the evidence to acquit or condemn shall, in the first instance, come from the ship's papers and the crew.⁴⁰ Where a belligerent capture has been made and the captured vessel seeks the aid of a neutral court on account of the supposed violation of neutrality, the burden rests upon the claimant to prove the supposed violation of neutrality.⁴¹

³⁶ *Hooper v. United States*, 22 Ct. Cl. (U. S.) 408, 454; *Johnson v. Thirteen Bales &c.*, 2 Paine (U. S.) 639, 6 Hall L. J. 97, Van Ness 45, 13 Fed. Cas. No. 7415; *Ten Hogsheads of Rum*, 1 Gall. (U. S.) 187, 23 Fed. Cas. No. 13830; *Short Staple, The*, 1 Gall. (U. S.) 104, 22 Fed. Cas. No. 12813; *Boxes of Opium v. United States*, 23 Fed. 367.

³⁷ *United States v. Hayward*, 2 Gall. (U. S.) 485, 26 Fed. Cas. No. 15336.

³⁸ *Luminary, The*, 8 Wheat. (U. S.) 407; *John Griffin, The*, 15 Wall. (U. S.) 29; *Slavers, The*, 2 Wall. (U. S.) 375; *Sarah and Caroline,*

The, Blatchf. Pr. Cas. 123, 21 Fed. Cas. No. 12340; *Ten Hogsheads of Rum*, 1 Gall. (U. S.) 187, 23 Fed. Cas. No. 13830; *Short Staple, The*, 12813; *Boxes of Opium v. United States*, 23 Fed. 367.

³⁹ *James Wells, The*, 7 Cranch (U. S.) 21.

⁴⁰ *Amiable Isabella, The*, 6 Wheat. (U. S.) 1; *Rover, The*, 2 Gall. (U. S.) 240, 20 Fed. Cas. No. 12091; *United States v. Hayward*, 2 Gall. (U. S.) 485, 26 Fed. Cas. No. 15336.

⁴¹ *La Amistad de Rues*, 5 Wheat. (U. S.) 385.

§ 3330. **Competency of witnesses.**—It appears to be the practice that on the original hearing the ship's papers and the preparatory examinations of the captured crew are the only evidence admissible. But where an order has been made for further proof the question of the competency of the captors as witnesses has arisen. Where the circumstances of the capture become material the facts are as much within the knowledge of the captors as the captured and the objection of interest would apply to one the same as to the other. Hence, the rule was early established in admiralty that no person was rendered incompetent as a witness on the ground of interest. These courts established and recognized the admissibility of such testimony and received it subject to the usual tests as to its credibility.⁴² In general an alien enemy is not disqualified as a witness.⁴³ In ordinary cases the prize crew, whether national, neutral or hostile, are competent witnesses.⁴⁴ Where further proof has been ordered the affidavits of the captors are evidence of facts within their own knowledge;⁴⁵ and the attestations of the claimant and his clerks, together with the correspondence between him and his agents, are admissible.⁴⁶ But it seems to be the rule that where a joint capture is set up the testimony of witnesses of the ship claiming as joint captors is not sufficient of itself to establish the claim.⁴⁷

§ 3331. **Condemnation—False claim.**—The utmost good faith is required in the condemnation of prize vessels or property. Prize courts will not aid persons who themselves have been guilty of frauds. This principle was stated by Justice Story thus: "There is another rule, too, founded in the most salutary and benign principles of justice, that the assertion of a false claim, in whole or in part, by an agent of, or in connivance with, the real owners, is a substantive cause of forfeiture, leading to condemnation of property."⁴⁸

⁴² *Anne, The*, 3 Wheat. (U. S.) 434; *Boston, The*, 1 Sumn. (U. S.) 328, 3 Fed. Cas. No. 1673, 11 Am. Jur. 21. Gall. (U. S.) 401, 21 Fed. Cas. No. 12258.

⁴³ *Falcon, The*, 6 C. Rob. 194.

⁴⁴ *Henrick and Maria, The*, 4 C. Rob. 43.

⁴⁵ *Maria, The*, 1 C. Rob. 340; *Resolution*, 6 C. Rob. 13; *Sally, The*, 1

⁴⁶ *Adelaide, The*, 3 C. Rob. 281.

⁴⁷ *Boston, The*, 1 Sumn. (U. S.) 328, 3 Fed. Cas. No. 1673, 11 Am. Jur. 21; *La Belle Coquette*, 1 Dods. 18; *John*, 1 Dods. 363; *Arthur*, 1 Dods. 423; *Galen*, 2 Dods. 19.

⁴⁸ *Amiable Isabella, The*, 6 Wheat. (U. S.) 178.

§ 3332. Preparatory hearing—Further proof.—The rule is that “it is the duty of the captors, as soon as practicable, to bring the ship’s papers into the registry of the district court, and to have the examinations of the principal officers and seamen of the captured ship taken before the district judge, or commissioners appointed by him, upon the standing interrogatories. It is exclusively upon these papers and the examinations, taken in *praeparatorio*, that the cause is to be heard before the district court. If, from the whole evidence, the property clearly appear to be hostile or neutral, condemnation or acquittal immediately follows. If, on the other hand, the property appears doubtful, or the case be clouded with suspicions or inconsistencies, it then becomes a case of further proof, which the court will direct or deny, according to the rules which govern its legal discretion on this subject. Further proof is not a matter of course; it is granted in cases of honest mistake or ignorance, or to clear away any doubts or defects consistent with good faith. But if the parties have been guilty of gross fraud or misconduct, or illegality, further proof is not allowed; and under such circumstances, the parties are visited with all the fatal consequences of an original hostile character.” The reason for requiring prompt action on the part of the captors is said to be that “the evidence to acquit or condemn must, in the first instance, come from the papers and crew of the captured ship.”⁴⁹ The court is not concluded by this original evidence; it may order further proof when a doubt arises on any

⁴⁹ *Dos Hermanos, The*, 2 Wheat. (U. S.) 76; *Adeline, The*, 9 Cranch (U. S.) 244, 285; *Manila Prize Cases*, 188 U. S. 254, 23 Sup. Ct. 415; *Ann Green, The*, 1 Gall. (U. S.) 274, 1 Fed. Cas. No. 414; *Olinda-Rodrigues, The*, 89 Fed. 105; *Bothnea, The*, 2 Gall. (U. S.) 78, 3 Fed. Cas. No. 1686; *Arabella, The*, 2 Gall. (U. S.) 368, 1 Fed. Cas. No. 501; *Amiable Isabella, The*, 6 Wheat. (U. S.) 1, 77; *Sally Magee, The*, 3 Wall. (U. S.) 451; *Sir William Peel, The*, 5 Wall. (U. S.) 517; *Adula, The*, 176 U. S. 361, 89 Fed. 351, 20 Sup. Ct. 432; *Gray Jacket, The*, 5 Wall. (U. S.) 342, 368; *Pizarro, The*, 2 Wheat. (U. S.) 227; *Liverpool Packet, The*, 1 Gall. (U. S.) 513, 15

Fed. Cas. No. 8406; *London Packet, The*, 1 Mason (U. S.) 14, 15 Fed. Cas. No. 8474; *Cheshire, The*, Blatchf. Pr. Cas. 151, 5 Fed. Cas. No. 2655; *Newfoundland, The*, 89 Fed. 99; *Falcon, The*, Blatchf. Pr. Cas. 52, 8 Fed. Cas. No. 4616; *Lively, The*, 1 Gall. (U. S.) 315, 15 Fed. Cas. No. 8403; *Appendix*, 2 Wheat. (U. S.) 498; *Alliance, The*, Blatchf. Pr. Cas. 646, 1 Fed. Cas. No. 246; *Vigilantia, The*, 1 C. Rob. 1; *Hulda, The*, 3 C. Rob. 235; *Madonna del Burso, The*, 4 C. Rob. 169; *St. Juan Baptista, The*, 5 C. Rob. 33; *Wilhelmsberg, The*, 5 C. Rob. 143; *Elsebe, The*, 5 C. Rob. 173; *Benedict Adm.*, § 512a; *Story Prize Courts* 17.

question. Where a suspicion arises the court will generally direct further proof.⁵⁰

§ 3333. Examination of crew—Time and manner.—The examination should take place as soon as possible after the arrival of the vessels, in order to guard as much as possible against fraud, and the witnesses are not allowed to have communication with or to be instructed by counsel. The captors should introduce all witnesses in succession and they will not be permitted, without special order, to examine witnesses at a subsequent time.⁵¹ The examination is limited to the persons on board at the time of the capture, unless the court grants special permission for the examination of others.⁵² Courts will hesitate to condemn a vessel and cargo where the captors have failed, without any excuse, to send in the master as a witness.⁵³ For like reasons equal strictness is required of the claimants, and if they keep back any of the captured crew, for two or three days after the vessel comes into port, the commissioners will be justified in not examining them.⁵⁴

§ 3334. Further proof—When allowed.—It is evident that in many cases the refusal to allow further proof would amount to a denial of justice. The application of the rules of equity in certain classes of prize cases admits the order for further proof. The general rule on this subject has been stated as follows: "The most ordinary cases of further proof are where the cause appears doubtful upon the original papers, and the answers to the standing interrogatories; and in such cases, if the parties have conducted themselves with good faith, and the error or deficiency may be referred to honest ignorance or mistake, the court will indulge them time to supply the defects, by the introduction of new evidence. But further proof is, in no case, a matter of right, and rests to the sound discretion of the court. Further proof is, in all cases, necessary, where the master does not swear to, or give any account of the property."⁵⁵ Further proof in

⁵⁰ *Romeo, The*, 6 C. Rob. 351;
Sarah, The, 3 C. Rob. 330.

⁵¹ *Speculation, The*, 2 C. Rob. 293.

⁵² *Eliza and Katy, The*, 6 C. Rob. 185; *Henrick and Maria, The*, 4 C. Rob. 43.

⁵³ *Julia, The*, 2 Sprague (U. S.) 164, 14 Fed. Cas. No. 7576.

⁵⁴ *Anna, The*, 1 C. Rob. 331; *William and Mary, The*, 4 C. Rob. 381.

⁵⁵ Appendix, 1 Wheat. 504.

prize cases is usually admitted by written evidence and depositions only and not by way of oral proof.⁵⁶

§ 3335. **Further proof—When not allowed.**—It must appear that the application for further proof is made in good faith. Such further proof will not be allowed when there are appearances of collusion between the captors and the captured vessel. And as further proof cannot extend beyond the explanation of the facts of the capture it will not be allowed where the obvious purpose is to substitute evidence which might be procured after opportunity given to influence witnesses and to enable the parties to manufacture a story that would meet the emergency, and offer this instead of the regular evidence required by law.⁵⁷ Where a neutral seeks to establish an interest with an enemy in a vessel or cargo, he will not be permitted to introduce further proof to establish his neutral interest after he has made a fraudulent attempt to cover and claim the enemy's interest in a prize court.⁵⁸ The rule is that where fraudulent papers have been used further proof is never allowed.⁵⁹ Nor where there is a false destination, and false papers.⁶⁰ And further proofs will not be allowed where the case appears incapable of fair explanation.⁶¹ "Where there has been gross prevarication, or an attempt to impose spurious claims upon the court, or such a want of good faith as shows that the parties cannot safely be trusted with an order for further proof, it will be denied."⁶² Neither will further proof be allowed

⁵⁶ *George, The*, 2 Gall. (U. S.) 249, 10 Fed. Cas. No. 5327.

⁵⁷ *Bothnea, The*, 2 Gall. (U. S.) 78, 3 Fed. Cas. No. 1686; *George, The*, 2 Gall. (U. S.) 249, 10 Fed. Cas. No. 5327; Appendix, 1 Wheat. (U. S.) 499.

⁵⁸ *Betsy, The*, 2 Gall. (U. S.) 377, 3 Fed. Cas. No. 1364; *Graaff Bernstorff, The*, 3 C. Rob. 109; Appendix, 1 Wheat. (U. S.) 505.

⁵⁹ *Welvaart, The*, 1 C. Rob. 122; *Juffrouw Anna, The*, 1 C. Rob. 125; *Juffrouw Elbrecht, The*, 1 C. Rob. 127.

⁶⁰ *Nancy, The*, 3 C. Rob. 122; *Mars, The*, 6 C. Rob. 79.

⁶¹ *Vrouw Hermina, The*, 1 C. Rob. 163.

⁶² Appendix, 1 Wheat. (U. S.)

505; *St. Lawrence, The*, 8 Cranch (U. S.) 434; *Hazard's Cargo, The*, 9 Cranch (U. S.) 205; *Dos Hermanos, The*, 2 Wheat. (U. S.) 76; *Pizarro, The*, 2 Wheat. (U. S.) 227; *Sally Magee, The*, 3 Wall. (U. S.) 451; *Gray Jacket, The*, 5 Wall. (U. S.) 342; *Adula, The*, 176 U. S. 361, 20 Sup. 432; *San Jose Indiano, The*, 1 Mason (U. S.) 38, 21 Fed. Cas. No. 12324; *Liverpool Packet, The*, 1 Gall. (U. S.) 513; 15 Fed. Cas. No. 8406; *Sally, The*, 1 Gall. (U. S.) 401, 21 Fed. Cas. No. 12258; *Bothnea, The*, 2 Gall. (U. S.) 78, 3 Fed. Cas. No. 1686; *George, The*, 2 Gall. (U. S.) 249, 10 Fed. Cas. No. 5327; *Springbok, The*, Blatchf. Pr. Cas. 434, 22 Fed. Cas. No. 13264.

where there has been a spoliation of papers.⁶³ The general rule is that further proof is not allowed where the parties have been guilty of gross fraud, misconduct or illegality.⁶⁴

§ 3336. Further proof allowed in joint or collusive captures. Where the capture is joint or collusive it becomes necessary to depart somewhat from the usual simplicity of the ordinary prize proceedings. Thus, in a case of joint capture neither the papers of the prize vessel nor the depositions of her crew would throw any light as to the proportions in which the owners and crew of the capturing vessel are entitled. Hence, the testimony which will decide this question must come from other sources; accordingly extrinsic testimony is admitted to establish this right. The rule is analogous where the captors are charged with fraud. The exculpatory evidence could scarcely be expected from the prize court, nor would the interrogatories be calculated to establish this fact. It could scarcely be expected that evidence taken for the purpose of determining whether the captured vessel ought to be condemned or restored, would establish the fact that such capture had been either bona fide or collusive. Justice requires that an opportunity to explain doubtful or suspicious circumstances should be given; and that fraud should not be fixed until the party charged has been given an opportunity to clear himself from its imputation. In such cases nothing less than a confession of the fraud should move the court to refuse further proof.⁶⁵

§ 3337. Ship's papers—Prima facie proof requisite.—It has become the custom of the seas, as required by the laws of different nations, for the protection of commerce, that in time of war, at least, ships sailing the seas shall be provided with certain papers and documents that will prima facie show ownership, nationality and distinction. These are to be used in case of seizure for protection, and in the absence of suspicious circumstances may be regarded as sufficient evidence of the neutrality of the vessel. The general rule on this subject is more fully stated as follows: "On the question of prize or no prize, what evidence does the law of nations admit for the determination of it? The national interest of every commercial country requires, that some mode or criterion be adopted to ascertain the

⁶³ *Rising Sun, The*, 2 C. Rob. 104.

⁶⁴ *George, The*, 1 Wheat. (U. S.)

⁶⁵ *Dos Hermanos, The*, 2 Wheat. 408.

(U. S.) 76.

ship, cargo, destination, property and nation to which such ship belongs; not only as a security for a fair commerce according to law; but as a guard against fraud and imposition in the payment and collection of duties, imposts and commercial revenues. Also the peace and tranquillity of nations equally require, that the like criterion should be adopted, to distinguish the ships of different countries found on the high seas in time of war; to prevent an indiscriminate exercise of acts of hostility, which may lay the foundation of general and universal war. Hence, it is, that every commercial country has directed, by its laws, that its ships shall be furnished with a set of papers called ship papers; and that criterion the law of nations adopts, in time of war, to distinguish the property of different powers, when found at sea; not indeed as conclusive, but presumptive evidence only. Bills of lading, letters of correspondence, and all other papers on board, which relate to the ship or cargo, are also considered as *prima facie* evidence of the facts they speak; because such papers naturally accompany such a mercantile transaction."⁶⁶ A neutral who ships his goods in an enemy's vessel is bound to send with them such documents as shall establish their neutral character, and failing to do so he justly incurs the penalty of forfeiture.⁶⁷ The ship's papers found on board are proper evidence only when properly verified, the papers alone prove nothing and to entitle them to any weight they must be supported by the oaths of persons in the situation to give them validity.⁶⁸ This rule was otherwise briefly stated as follows: "Some papers undoubtedly should be carried for protection; that is carried for the benefit of the ship to divert suspicion, to avoid detention and delay, and to afford at least *prima facie* proof that she is what she pretends to be, an innocent vessel engaged in legitimate business."⁶⁹

§ 3338. Ship's papers—Production.—A very strict rule of prize courts requires the captors immediately upon bringing the captured vessel into port to deliver all papers found on board the captured ship; these papers should be delivered to the registry of the court and properly verified as the papers of the captured vessel. This principle

⁶⁶ *Resolution, The*, 2 Dall. (U. S.) 19; *Amiable Isabella, The*, 6 Wheat. (U. S.) 1, 69. *United States*, 27 Ct. Cl. (U. S.) 116.

⁶⁷ *Flying Fish, The*, 2 Gall. (U. S.) 373, 9 Fed. Cas. No. 4892; *Cole v.* ⁶⁸ *Juno, The*, 2 C. Rob. 120; *Romeo, The*, 6 C. Rob. 351.

⁶⁹ *Cushing v. United States*, 22 Ct. Cl. (U. S.) 1, 54.

and the reasons on which it is based were stated by Justice Story as follows: "It is the duty of the captors, by the general law of prize, immediately upon arrival in port, to deliver upon oath to the registry of the court, all papers found on board the captured ship. This duty is enforced by the general instructions of the executive in the most positive manner. A strict adherence to it is expected on all occasions; and every deviation will be watched by the court with uncommon jealousy. It is not for the captors to select such papers, as they may deem important, and present them in the cause. Infinite mischiefs and inconveniencies might result from such a course. It would afford temptation to improper suppression of papers, and jeopard the rights, not only of citizens, but of neutrals."⁷⁰ The rule is otherwise stated thus: "It is also the duty of the prize master to deliver up to the district judge all the papers and documents found on board and, at the same time, to make an affidavit that they are delivered up as taken, without fraud, addition, seduction or embezzlement."⁷¹ The importance of a ship's papers is such that the master of the ship will not be heard in a prize court to aver either his ignorance or forgetfulness of the ship's documents. It is his duty to know what they are, and to admit his ignorance of their contents would be to overthrow all presumptions which govern in prize proceedings.⁷² Where the ship's papers are withheld a full and satisfactory explanation must be made to the court or judgment of condemnation will be withheld.⁷³ But where the ship's papers were regular it was held that the mere possession of an enemy's license was no evidence of an intention to proceed to the enemy's port, as a vessel is justifiable in carrying papers to deceive an enemy.⁷⁴

§ 3339. Ship's papers—Custody.—On the production of a ship's papers they are to be deposited with the prize court and to be kept by it under seal. This includes the papers found on board the prize vessel and all private papers, sailing directions, etc. No person is to see or examine these papers until the claims have all been put in, the crew of the captured vessel examined and the cause ready for hearing. The papers then, on order of the court, are open to inspection of counsel. The purpose of this practice is stated thus:

⁷⁰ *Diana, The*, 2 Gall. (U. S.) 93,
7 Fed. Cas. No. 3876.

⁷¹ Appendix, 1 Wheat. 495.

⁷² *Julia, The*, 8 Cranch (U. S.)
181.

⁷³ *Arabella, The*, 2 Gall. (U. S.)
368, 1 Fed. Cas. No. 501.

⁷⁴ *United States v. Matilda*. 5

Hughes (U. S.) 44, 26 Fed. Cas.
No. 15741.

"One object of this practice is that the master and crew of the prize shall testify to what is in their own knowledge, and not be able to shape their testimony so as not to contradict the documents. Another is, that persons coming forward to claim captured property shall state their claims according to the facts, without the opportunity to shape them according to documents or papers on board. If the ship's papers are true, and the claims true, there will be no material variation, and no injustice is done to claimants, for mere formal or verbal mistakes in claims may always be freely corrected, if the examination shows them to be bona fide, and no claim is ever rejected for an error that is amendable. But, if the papers are false, simulated equivocal, or contradictory, the obligation to put in the claims without opportunity to inspect the papers, will almost always lead to detection of the fraud. Another reason given for the practice is that, if the papers were open to all, persons might come forward who had no actual interest, and represent the interests indicated by the papers."⁷⁵

§ 3340. Ship's papers—Destruction and spoliation.—The destruction or spoliation of a ship's papers raises the strongest presumption against the good faith and neutrality of the captured vessel. It is regarded as a strong circumstance of suspicion. It was formerly the rule that proof of the spoliation of papers excludes further proof, and does of itself infer condemnation on the presumption that the papers were destroyed for the purpose of fraudulently suppressing evidence which, if preserved, would produce the same result. This rule has been modified to the extent of holding that if all other circumstances are clear, the mere destruction or spoliation of papers will not of itself condemn, and especially where it was done by one who had some interest of his own to protect by the act.⁷⁶ It is now held to be a circumstance subject to explanation; "yet if the explanation be not prompt or frank, or be weak and futile, if the case labors under heavy suspicions, or if there be a vehement presumption of bad faith, or gross prevarication, it is ground for the denial of further proof, and condemnation ensues from defects in evidence, which the party is not permitted to supply."⁷⁷ This principle was stated by

⁷⁵ *Cuba, The*, 2 Sprague (U. S.) 168, 6 Fed. Cas. No. 3457; *San Jose Indiano, The*, 2 Gall. (U. S.) 268, 21 Fed. Cas. No. 12322. *The*, 8 Cranch (U. S.) 181; *Bermuda, The*, 3 Wall. (U. S.) 514; *Boston, The*, 1 Sumn. (U. S.) 328, 3 Fed. Cas. No. 1673.

⁷⁶ *Hunter*, 1 Dods. 480; *Julia*,

⁷⁷ *Peterhoff, The*, Blatchf. Pr. Cas.

Sir William Scott, thus: "No rule can be better known than that neutral masters are not at liberty to destroy papers; or, if they do, that they will not be permitted to explain away such a suppression, by saying 'they were only private letters.' In all cases it must be considered as proof of mala fides; and, where that appears, it is an universal rule to presume the worst against those who are convicted of it. It will always be supposed that such letters relate to the ship or cargo, and it was of material consequence to some interests that they should be destroyed."⁷⁸ Where the destruction or spoliation is not to be imputed to the prize master copies instead of the originals may be used.⁷⁹

§ 3341. Ship's papers—Absence, fraudulent concealment, etc. The absence or the fraudulent concealment of a ship's papers stands upon the same ground as destruction or spoliation; and where falsification or fraudulent concealment of papers is shown further proof will not be allowed to the party. Of this rule Justice Story said: "By the known practice of the court in cases of fraudulent concealment or falsification of papers the party would not be entitled to the benefit of further proof, for that is an indulgence granted only to honest mistake and unintentional error."⁸⁰ As the purpose of these papers is to furnish prima facie proof of innocence and honesty, therefore their absence is no more than the foundation of a reasonable suspicion which justifies an inquiry into the true character of the vessel and the voyage.⁸¹ "The absence of a log-book, unaccounted for, is a matter of distrust in time of war as to the integrity of purpose in the outfit and operation of a trading vessel captured under equivocal and disparaging circumstances; as it is a document so usual and important, as evidence of the transactions of a ship navigating abroad, and one which so universally accompanies trading

463, 19 Fed. Cas. No. 11024; Hunter, 1 Dods. 480; Pizarro, The, 2 Wheat. (U. S.) 227; Bernardi v. Motteux, 2 Doug. 574; Rising Sun, The, 2 C. Rob. 104; Ella Warley, The, Blatchf. Pr. Cas. 288, 8 Fed. Cas. No. 4373; 1 Kent Comm. 157, 158.

⁷⁸ Peterhoff, The, Blatchf. Pr. Cas. 463, 19 Fed. Cas. No. 11024; Two Brothers, The, 1 C. Rob. 131; Rosalie and Betty, The, 2 C. Rob. 343.

⁷⁹ Julia, The, 8 Cranch (U. S.) 181.

⁸⁰ Liverpool Packet, The, 1 Gall. (U. S.) 513, 15 Fed. Cas. No. 8406; Juffrouw Anna, The, 1 C. Rob. 125; Welvaart, The, 1 C. Rob. 122; Eenrom, The, 2 C. Rob. 1; Springbok, The, Blatchf. Pr. Cas. 434, 22 Fed. Cas. No. 13264; Stephen Hart, The, Blatchf. Pr. Cas. 387, 22 Fed. Cas. No. 13364.

⁸¹ Cushing v. United States, 22 Ct. Cl. (U. S.) 1, 54.

vessels employed in foreign commerce. Its absence gives room for presumption that material matters have been fraudulently suppressed, and particularly where an object may exist for keeping it out of view."⁸² So, an attempt on the part of a neutral owner to mislead a blockading force by fraudulent representations of the ship's papers was held to amount to such fraudulent misconduct as would justify the confiscation of the vessel.⁸³

§ 3342. Ship's papers—Enemy's license.—So, it is the rule that navigating under a license from an enemy, is *prima facie* sufficient cause for a condemnation. Ignorance of the fact of the nature of the license is held to be a sufficient excuse unless the claimants have such constructive notice as will preclude them from showing a want of actual notice. Thus, the knowledge of the super-cargo is attributable to the shipper.⁸⁴ In the absence of positive proof of an enemy's license the circumstances may be such as to raise a presumption that the vessel had such a license and the burden of proof is then upon the claimant to repel such presumption.⁸⁵

§ 3343. Ship's papers—Passport, flags, etc.—Ships are generally required either by law or custom to carry passports, and in time of war such documents are regarded as indispensable. The nationality, neutrality or hostility of a vessel are determined by the documents such as passport, license, etc., together with the flag under which she sails. Owners of vessels are bound by these insignia of national character, and when they agree to take the flag and pass of a country they are not permitted in case of capture to change the position or nationality thus assumed. This insignia of nationality constitutes largely the proof as to the liability of a vessel to condemnation.⁸⁶

⁸² Joseph H. Toone, *The, Blatchf.* Pr. Cas. 223, 13 Fed. Cas. No. 7541; Mersey, *The, Blatchf.* Pr. Cas. 187, 17 Fed. Cas. No. 9489.

⁸³ Louisa Agnes, *The, Blatchf.* Pr. Cas. 107, 15 Fed. Cas. No. 8531.

⁸⁴ Hiram, *The, 1 Wheat.* (U. S.) 440; Ariadne, *The, 2 Wheat.* (U. S.) 143; Langdon Cheves, *The, 4 Wheat.* (U. S.) 103.

⁸⁵ Langdon Cheves, *The, 4 Wheat.* (U. S.) 103.

⁸⁶ William Bagaley, *The, 5 Wall.* (U. S.) 377, 409; Aurora, *The, 8 Cranch* (U. S.) 203; Hallie Jackson, *The, Blatchf.* Pr. Cas. 41, 11 Fed. Cas. No. 5961; Rogers v. Amado, *The, Newb.* 400, 20 Fed. Cas. No. 12005; Vrow Elizabeth, *The, 5 C. Rob.* 2; Fortuna, 1 Dods. 81, 87; Success, 1 Dods. 131; Primus, *The, 29 Eng. Law & Eq.* 589; Industrie, *The, 33 Eng. Law & Eq.* 572.

§ 3344. Joint capture—Presumption.—In prize cases it frequently happens that more than one vessel or crew claim a right to share in the prize on the ground that they assisted in the capture. In such cases it is called a joint capture. This right to share in the capture depends on the proof, and as to whether or not the evidence sufficiently shows that the claimants did assist in the capture within the meaning of the law. According to the English law the term captors or takers includes both those who actually make a prize and all who are associated in the taking. This association may be thus classified: (1) Vessels that happen to join in a chase or be in sight at the time of the capture; (2) or imposed by superior command as where a fleet or several vessels are engaged in a blockade or other common enterprise. In the first case, according to the English law, there was the presumption of fact that all the King's ships in sight during the chase or at the time of the capture, did by their presence encourage the captors and discourage the enemy; and the presumption was that such was their intention. However, this presumption could be overcome by proof that a vessel claiming as a joint captor could not have been seen by one or the other of the belligerents, or that there was no intention to aid, but that the claimant vessel was engaged in some duty or business inconsistent with either an effort or intention to aid in the capture.⁸⁷

§ 3345. Joint capture—Burden of proof.—The vessel and crew actually present at the capture are primarily entitled to the prize; hence, it logically follows that if any other vessel claims the right to share in the prize it must establish this right by competent evidence. It therefore follows naturally that the burden of proof is upon such joint claimant to bring itself clearly within the construction of the act of Parliament, or the rules of law, giving it the right to share in the prize. This rule as to burden of proof was stated by Sir William Scott as follows: "In all cases, the onus probandi lies on those setting up the construction, because they are not persons strictly within the words of the act, but let in only by the interpretation of those acting under a competent authority to interpret it; it lies with the claimants in joint capture, therefore, either to allege some cases in which their construction has been admitted in former instances, or

⁸⁷ *Selma, The*, 1 Low. (U. S.) 30, 125; *Ella and Anna, The*, 2 Sprague 21 Fed. Cas. No. 12647; *Galen*, 2 (U. S.) 267, 26 Law R. 669, 8 Fed. Dods. 19; *La Melanie*, 2 Dods. 122, Cas. No. 4368.

to show some principle in their favor, so clearly recognized and established as to have become almost a first principle in cases of this nature. The being in sight, generally, and with some few exceptions, has been so often held to be sufficient to entitle parties to be admitted joint captors, that where that fact is alleged, we do not call for particular cases to authorize the claims; but where that circumstance is wanting, it is incumbent on the party to make out his claim by an appeal to decided cases, or at least to principles, which are fairly to be extracted from those cases.”⁸⁸

§ 3346. Joint capture—Sight and signal distance.—To entitle a claimant to share as a joint captor, the proof must show that he was within sight or signal distance. It is not sufficient to show that at some time during the chase the claimant was within sight of the captor, but it must appear that at the time of the capture the claimant was within sight of both vessels, or that she was within such position that the usual signals, if made from the actual captors in the usual way, could have been heard or read and understood from the deck or top gallant forecastle, and that she was prepared and able to render assistance, if needed, in making the capture. The general rule as gathered from the decisions as to the position and distance of a vessel, to entitle her to share in the prize was stated thus: “She must have been so situated as to be able of her own accord, to contribute direct assistance to the captors by deterring the enemy from resistance, or by aiding physically in overcoming such resistance; and the vessel to be aided must have possessed the means of communicating intelligent directions to the one whose aid was needed.” This claiming a right to share in the prize on account of being near, but where no actual assistance was rendered, is known as the doctrine of constructive capture and it has been limited and guarded by the courts and legal profession, and in the absence of proof of actual assistance the presumption of law leans in favor of the actual captor. “The mere physical ability to discern the prize, or even the seeing her from the mast-head not imparting the ability to contribute assistance in making the capture, does not seem to have been recognized, in any authoritative case, as evidence of constructive assistance to another ship in effecting a capture.”⁸⁹

⁸⁸ *Vryheid, The*, 2 C. Rob. 1622; 280; *Ella and Anna, The*, 2 Sprague Selma, *The*, 1 Low. (U. S.) 30, 21 (U. S.) 267, 26 Law R. 669, 8 Fed. Cas. No. 12647; *L'Alerte*, 6 C. Cas. No. 4368. Rob. 238; *La Gloire*, Edw. Adm. ⁸⁹ *Anglia, The*, Blatchf. Pr. Cas.

§ 3347. **Joint capture—Common enterprise.**—Where vessels are engaged in a common enterprise and under one authority or command the claiming vessel need only show that it was one of the associates; that the capture was made by another of such associates, and that it was within the purpose of the association. When such facts are proved it is held that the actual position of the claiming vessel at the time of the capture is unimportant.⁹⁰ Where the claim is made on account of a joint venture or association the test seems to be in the proof of the fact that there was no separation of service. If the service is common and identical and there is no separation in the common purpose or venture a capture made by one under such circumstances is entitled to be shared by all. So if all are engaged in one common undistinguishable service having but one object immediate or remote, the several vessels performing the duty assigned to each, the capture by one has been held to inure to all.⁹¹ Lord Stowell expressed the principle underlying this class of cases to the effect

566, 1 Fed. Cas. 391; *Atlanta*, The, 2 Sprague (U. S.) 251, 3 Am. L. Reg. (N. S.) 675, 26 Law R. 204, 2 Fed. Cas. No. 619; *Cherokee*, The, 2 Sprague (U. S.) 235, 3 Am. L. Reg. (N. S.) 289, 5 Fed. Cas. No. 2640; *Ella*, The, 2 Int. Rev. Rec. 117, 8 Fed. Cas. No. 4367; *Ella and Anna*, The, 2 Sprague (U. S.) 267, 26 Law R. 669, 8 Fed. Cas. No. 4368; *St. John*, The, 2 Sprague (U. S.) 266, 21 Fed. Cas. No. 12225; *Mangrove Prize Money*, The, 188 U. S. 720, 23 Sup. Ct. 343; *Selma*, The, 1 Low. (U. S.) 30, 21 Fed. Cas. No. 12647; *Robert*, The, 3 C. Rob. 194, 201; *Le Niemen*, 1 Dods. 9; *Financier*, 1 Dods. 61; *Empress*, 1 Dods. 368; *Arthur*, 1 Dods. 423; *Dordrecht*, The, 2 C. Rob. 55; *Forsigheid*, The, 3 C. Rob. 311; *Lord Middleton*, The, 4 C. Rob. 153; *L'Alerte*, 6 C. Rob. 238; *Diomede*, 1 Acton 239; *Galen*, 2 Dods. 19; *L'Etoile*, 2 Dods. 106; *Naples Grant*, 2 Dods. 273; *Vryheid*, The, 2 C. Rob. 16; *Odin*, The, 4 C. Rob. 318, 325; *Trinidad*,

Island of, 5 C. Rob. 92; *La Furieuse*, Stew. N. Sc. 177.

⁹⁰ *Selma*, The, 1 Low. (U. S.) 30, 21 Fed. Cas. No. 12647; *Atlanta*, The, 2 Sprague (U. S.) 251; 3 Am. L. Reg. (N. S.) 675, 26 Law R. 204, 2 Fed. Cas. No. 619; *La Henriette*, 2 Dods. 96; *Naples Grant*, 2 Dods. 273, 286; *Forsigheid*, The, 3 C. Rob. 311, 315; *Empress*, 1 Dods. 368; *Nordstern*, Acton 128, 140. But see, *Trinidad*, *Island of*, 5 C. Rob. 92; *Arthur*, 1 Dods. 423; *Le Bon Adventure*, 1 Acton 211, 239; *Anglia*, The, Blatchf. Pr. Cas. 566, 1 Fed. Cas. 391; *St. John*, The, 2 Sprague 266, 21 Fed. Cas. No. 12225; *Aries*, The, 2 Sprague (U. S.) 262, 26 Law R. 336, 1 Fed. Cas. No. 529; *Cherokee*, The, 2 Sprague (U. S.) 235, 3 Am. L. Reg. (N. S.) 289, 5 Fed. Cas. No. 2640; *Diomede*, 1 Acton 239; *Nostra Signora de los Dolores*, 1 Acton 262.

⁹¹ *Selma*, The, 1 Low. (U. S.) 30, 21 Fed. Cas. No. 12647; *Harmonie*, 3 C. Rob. 318; *Guillaume Tell*, The, Edw. Adm. 6.

that privity of purpose created community of interest.⁹² According to the holdings in some old cases, this rule of sharing in the prize on account of association or joint venture does not apply to what is known in maritime law as head money.⁹³ Sight alone is not sufficient to entitle a claimant to head money; this is restricted within narrower limits than that of prize. Actual contribution or assistance is necessary to entitle a joint captor to share in head money.⁹⁴ The rule applying to joint capture does not obtain generally where the capture is made by the combined efforts of land and naval forces.⁹⁵

⁹² *Selma, The*, 1 Low. (U. S.) 30, 21 Fed. Cas. No. 12647; *Dordrecht, The*, 2 C. Rob. 55.

⁹³ *L'Alerte*, 6 C. Rob. 238.

⁹⁴ *El Rayo*, 1 Dods. 42; *La Clorinde*, 1 Dods. 436; *Ville de Varsovie*, 2 Dods. 301; *La Bellone*, 2 Dods. 343; *La Gloire*, Edw. Adm. 280.

⁹⁵ *Siren, The*, 13 Wall. (U. S.) 389; *United States v. Farragut*, 22 Wall. (U. S.) 406; *Porter v. United States*, 106 U. S. 607, 1 Sup. Ct. 539; *Dordrecht, The*, 2 C. Rob. 55; *Genoa*, 2 Dods. 444; *Hoagskarpel*, Lords of App. 1785; *Booty in the Peninsula*, 1 Hagg. Adm. 39, 47.

CHAPTER CLXVI.

SALVAGE.

Sec.	Sec.
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3349. Definition.	3360. Amount of salvage—Circumstances control.
3350. Definitions—By courts.	3361. Agreement for salvage services—Effect.
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3352. Success essential—Exceptions.	3363. Agreement valid—A bar to salvage claim.
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3354. Essential elements — Claimant's proof.	3365. Agreement—Burden of proof.
3355. Rescue—Impending peril.	3366. Claim for salvage—Forfeiture.
3356. Impending peril—Degree of proof.	
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§ 3348. **Generally.**—It has always been the policy of maritime law to encourage the saving of property, such as ships and cargo when they are in peril and in danger of being lost at sea. Mariners as a class are brave and courageous and are usually ready and willing to make sacrifices, endure hardships and assume great risks in order to save the lives of passengers and their fellow seamen, or to recover vessels and property that are in imminent danger of being lost. When such risks have been assumed, the dangers of the sea braved, and valuable property rescued and preserved, the law does not leave the compensation of the rescuers to the mere whim or gratitude of the owner, but rewards with a compensation that is in some degree adequate to the dangers encountered and the value of the property thus preserved. This compensation the law calls salvage and the persons saving the property, salvors. Navigation and commerce depend largely for protection on the services of salvors and it is to the interest of these that such recompense be awarded the salvors as shall encourage them to exertion and honesty in rescuing vessels and cargoes. At the same time courts recognize the necessity of so ad-

ministering the salvage laws as to prevent professional wreckers from exacting unreasonable and extortionate amounts in the hour of peril; in such cases maritime courts will not be bound by the quantum meruit rule of measuring such services by their actual value, but pursue a more liberal policy and give a reward or bounty to those whose labor, intrepidity and perseverance save vessels from the dangers of the sea.¹

§ 3349. **Definition.**—Courts of admiralty and writers on maritime law have given various definitions for the term salvage. Many of these are misleading and some are incomplete. It is apparent from the adjudicated cases that the definitions are inaccurate which attempt to limit salvage to compensation for services. While it is always compensation, yet it is often in the nature of a reward or bounty, depending on circumstances. Recent text writers say that “salvage is the reward payable for services rendered in saving any wreck or in rescuing a ship or boat, or her cargo or apparel, or the lives of persons belonging to her, from loss or danger at sea.”² Mr. Benedict says of it: “Salvage is the compensation due to persons by whose voluntary assistance a ship or its lading has been saved to the owner from impending peril, or recovered after actual loss.”³ One of the ingredients of a salvage service is enterprise in the salvors in going out in tempestuous weather to assist a vessel in distress.⁴

§ 3350. **Definitions—By courts.**—A more comprehensive definition, as given by one federal court: “Salvage consists—First, of an

¹ *Sandringham, The*, 10 Fed. 556, 572; *Coast &c. Co. v. Phoenix Ins. Co.*, 13 Fed. 127; *Fannie Brown, The*, 30 Fed. 215; *Henry Steers, Jr., The*, 110 Fed. 578; *Cromwell v. Island City, The*, 1 Cliff. (U. S.) 221, 228, 6 Fed. Cas. No. 3410; *Blaireau, The*, 2 Cranch (U. S.) 266; *Camanche, The*, 8 Wall. (U. S.) 448; *Blackwall, The*, 10 Wall. (U. S.) 1; *Sabine, The*, 101 U. S. 384; *Fisher v. Sibyl, The*, 5 Hughes (U. S.) 61, 6 Hall L. J. 509, 4 Wheat. 98, 9 Fed. Cas. No. 4824; *Hand v. Elvira, The*, Gilp. (U. S.) 60, 11 Fed. Cas. No. 6015; *Henry*

Ewbank, The, 1 Sumn. (U. S.) 400; *Cargo of the Edwards*, 12 Fed. 508; *Hebe, The*, L. R. 4 P. D. 217; *Craigs, The*, L. R. 5 P. D. 186. See also, *Theta, The*, 135 Fed. 129.

² *Williams & Bruce* Adm. 127.

³ *Benedict* Adm., § 300; *Parsons Shipping* 260; *Hand v. Elvira, The*, Gilp. (U. S.) 60, 11 Fed. Cas. No. 6015; *Rita, The*, 10 C. C. A. 629; 62 Fed. 761; *Norris v. Island City, The*, 1 Cliff. (U. S.) 219, 18 Fed. Cas. No. 10306.

⁴ *Fanny Brown, The*, 30 Fed. 215; *Clifton, The*, 3 Hagg. Adm. 117.

adequate compensation for the actual outlay of labor and expense made in the enterprise; and second, of the reward as bounty allowed from motives of public policy as a means of encouraging extraordinary exertions in the saving of life and property in peril at sea.”⁶ A federal court recently said of it: “Salvage is decreed by courts of admiralty as a reward for services successfully rendered in saving property from maritime damage, not on the principle of a quantum meruit, or as compensatory remuneration, but as a reward for perilous services, and as an inducement to seamen and others to readily engage in such undertakings and assist in saving life and property. Danger, peril and a successful deliverance therefrom either by voluntary effort, special request of, or by contract with the owner constitutes a case of salvage, whether rendered by one or more salvors.”⁷ As otherwise defined it is said to be “the relief of property from an impending peril of the sea by the voluntary exercise of those who are under no legal obligation to render assistance and the consequent ultimate safety of the property, constitutes a technical case of salvage.”⁸ “Salvage is a reward decreed by a court of admiralty for services successfully rendered in saving property from maritime danger by persons under no obligation of duty to render the services, and who voluntarily enter upon them.”⁹ “Salvage is an amount allowed in excess of mere remuneration for work and labor, or principles of public policy, not only as a reward to the particular salvors, but as an inducement to others to undergo risk and peril in the rescue of property from danger.”⁹

§ 3351. Success essential.—Salvage is payable only out of the property rescued and saved. The essential ingredients which must be established in order to warrant a judgment for salvage presupposes that the salvage enterprise has been successful and that the property, or some part of it has been saved. The usual proceedings by salvors is by an action in rem and in all such cases there could be neither action nor judgment except there is some property which could be

⁶ *Egypt, The*, 17 Fed. 359, 376; *Catalina, The*, 44 C. C. A. 638, 105 Fed. 633.

⁷ *Flottbek, The*, 55 C. C. A. 448, 118 Fed. 954.

⁸ *Hennessey v. Versailles, The*, 1 Curt. (U. S.) 353, 11 Fed. Cas. No. 6365; *Adams v. Island City, The*,

1 Cliff. (U. S.) 210, 216, 1 Fed. Cas. No. 55; *Davey v. Mary Frost, The*, 3 Cent. L. J. 419, 22 Int. Rev. Rec. 82, 7 Fed. Cas. No. 3591; *Queen of the Pacific, The*, 21 Fed. 459.

⁹ *Fanny Brown, The*, 30 Fed. 215.

⁹ *Fanny Brown, The*, 30 Fed. 215; *Industry, The*, 3 Hagg. Adm. 203.

executed. But in any event before salvage can be decreed the proof must show that the enterprise was successful, and that property of some value was rescued and saved out of which the salvage may be paid. "The very principle of salvage is, to give reward for exertions which have been successful."¹⁰ Salvage will not be decreed where the evidence shows that the salvors voluntarily abandoned the enterprise and left the disabled vessel in the same plight as when the services were undertaken.¹¹

§ 3352. Success essential—Exceptions.—There are some apparent exceptions to the rule in the preceding section to the effect that the proof must show that the wrecking enterprise was successful. The exception, however, does not change the rule in that it must be shown that property of some value was saved. But it is not absolutely essential that it be shown by the evidence that the claimant vessel or crew ultimately produced this result; and it is to this part of the rule that the exception applies. The first proposition under this exception is that where the peril is continuous all vessels whose exertions contributed directly to the final rescue may share in the award.¹² Another exception is found in that class of cases where the salvors make the most meritorious exertions and where either from necessity the salvors must abandon the property in order to save life,¹³ or where, from accidental cause and the design of those in charge of the imperiled vessel, the immediate efforts of the claimant were unsuccessful, but the imperiled vessel is finally rescued by other means.¹⁴ Still another exception is found where salvage is allowed where it is made to appear that the claimants as salvors succeeded in bringing the property into a position or condition where it was saved by the subsequent exertions of others. In this class proof of continuous

¹⁰ *Blackwall, The*, 10 Wall. (U. S.) 1, 12; *Norris v. Island City, The*, 1 Cliff. (U. S.) 219, 18 Fed. Cas. No. 10306; *Anderson v. Edam, The*, 13 Fed. 135; *Santa Ana, The*, 107 Fed. 527; *Henry Steers, Jr., The*, 110 Fed. 578; *Cargo of the Edwards*, 12 Fed. 508; *Scott v. Clara E. Bergen, The*, 21 Fed. Cas. No. 12526a; *Lamington, The*, 30 C. C. A. 271, 86 Fed. 675; *Independence, The*, 2 Curt. (U. S.) 350, 18 Law R. 151, 13 Fed. Cas. No. 7014;

Avoca, The, 39 Fed. 567; *E. U., The*, 1 Spink 63; *Aztecs, The*, 21 L. T. N. S. 797.

¹¹ *Algitha, The*, 17 Fed. 551; *Anderson v. Edam, The*, 13 Fed. 135; *Aberdeen, The*, 27 Fed. 479; *Veen-dam, The*, 46 Fed. 489.

¹² *Anderson v. Edam, The*, 13 Fed. 135.

¹³ *E. U., The*, 1 Spink 63.

¹⁴ *Veendam, The*, 46 Fed. 489; *Henry Steers, Jr., The*, 110 Fed. 578.

exertion is not necessary to establish a claim to salvage.¹⁵ More than one set of salvors may contribute to the rescue, and all who engage in the enterprise and who materially contribute to the saving of the property are entitled to share in the award except in cases¹⁶ where the evidence shows that the services of original salvors are sufficient to save the property, and the claimant was a mere volunteer, whose services were not needed no salvage will be allowed.¹⁷

§ 3353. Burden of proof.—The rule as to burden of proof in salvage cases is not essentially different from that of other cases. The burden is on the claimant to establish by evidence such facts and circumstances as will bring him within the rule of a salvor. A high degree of proof is not required. The claimant is not required to produce proof sufficient to make it certain that the property was saved by his assistance. The rule as to the salvor's burden was thus stated by Judge Betts: "I am not aware of any principle which invests him with the rights and privileges of a salvor, until it is rendered reasonably probable upon the evidence that his labor or skill have contributed toward protecting property exposed to instant peril at sea from ultimate loss or further damage."¹⁸

§ 3354. Essential elements—Claimant's proof.—In order to establish a claim for salvage the proof must show such circumstances under which the services were rendered as will make the claim meritorious and bring it within the rules of a salvage enterprise. To establish such salvage enterprise the proof must generally show at least six essential

¹⁵ *Tolomeo, The*, 7 Fed. 497; *Muntz v. Raft of Timber*, 15 Fed. 555; *El Dorado, The*, 50 Fed. 951; *Island City, The*, 1 Black (U. S.) 121; *John Worts, The, Olc. (U. S.)* 462, 13 Fed. Cas. No. 7434; *Henry Ewbank, The*, 1 Sumn. (U. S.) 400, 417; *Samuel, The*, 15 Jur. 407; *Jonge Bastiaan*, 5 C. Rob. 322; *India, The*, 1 W. Rob. 406; *Albion, The, Lush. Adm.* 282.

¹⁶ *Blackwall, The*, 10 Wall. (U. S.) 1; *Adams v. Island City, The*, 1 Cliff. (U. S.) 210, 1 Fed. Cas. No. 55; *Norris v. Island City, The*, 1 Cliff. (U. S.) 219, 18 Fed. Cas. No. 1306; *Fanny Brown, The*, 30 Fed.

215; *Stone v. Jewell, The*, 41 Fed. 103; *Strathnevis, The*, 76 Fed. 855; *Sabine, The*, 101 U. S. 384; *Bartley, The, Swabey* 198; *Pride of Canada, The, Brown. & Lush.* 209; *Flottbek, The*, 55 C. C. A. 448, 118 Fed. 954.

¹⁷ *Avoca, The*, 39 Fed. 567.

¹⁸ *John Wurts, The, Olc. (U. S.)* 462, 16 Hunt. Mer. Mag. 383, 13 Fed. Cas. No. 7434; *Susan, The*, 1 Sprague (U. S.) 499, 23 Fed. Cas. No. 13630; *Elphicke v. White Line Towing Co.*, 46 C. C. A. 56, 106 Fed. 945; *Arthur, The*, 6 L. T. N. S. 556; *Resultatet, The*, 17 Jur. 353; *British Empire, The*, 6 Jur. 608.

ingredients: (1) The degree of danger from which the property was rescued; (2) the value of the property saved, or that it was of great value; (3) that the salvors and their property incurred serious and continual risk in the rescue; (4) the value of the property used by the salvors in saving the vessel or cargo and the danger or risk to which it was exposed; (5) the extraordinary or unusual skill shown in rendering the service; (6) the time and labor spent in the enterprise. In speaking of these one court said: "These are the ingredients which must enter, each to a greater or less degree, as a *sine qua non* into every true salvage service; and to these I will add, not as an ingredient so much as a consideration to be taken into view: the degree of success achieved and the proportions of value lost and saved."¹⁹

§ 3355. Rescue—Impending peril.—From the definitions of salvage previously given it is apparent that to entitle a vessel or crew to salvage the proof must generally show that the vessel or property from or out of which the salvage is claimed was rescued from some peril of the sea under a threatened and impending danger that would, from all appearances, result in the ultimate destruction or loss of the vessel or other property. The service for which salvage is allowed is said to be "a service which is voluntarily rendered to a vessel needing assistance, and is designed to relieve her from some distress or danger either present or to be reasonably apprehended." It is sufficient if the "situation was one of strong apprehension of immediate danger." The rule has otherwise been stated as follows: "It is not necessary there should be absolute danger to constitute a salvage service. It is sufficient if there is a state of difficulty and reasonable apprehension. Neither is it necessary to show that those on board either requested or expressly accepted the assistance if salvage services are rendered to a ship. It is sufficient if the circumstances are

¹⁹ *Sandringham, The*, 5 Hughes (U. S.) 1; *Flottbek, The*, 55 C. C. (U. S.) 316, 10 Fed. 556; *Egypt, The*, A. 448, 118 Fed. 954; *Mary E. Dana*, 17 Fed. 359; *Queen of the Pacific, The*, 17 Fed. 353; *Lamington, The*, 21 Fed. 459; *Rita, The*, 10 C. C. 30 C. C. A. 271, 86 Fed. 675; *Baker, A. 629*, 62 Fed. 761; *Catalina, The*, 44 C. C. A. 638, 105 Fed. 633; *Camanche, The*, 8 Wall. (U. S.) 448; *The, 4 C. C. A. 281*, 54 Fed. 197; *Hennessey v. Versailles, The*, 1 Cope v. Dry Dock Co., 119 U. S. Curt. (U. S.) 353, 361, 11 Fed. Cas. 628, 7 Sup. Ct. 336. No. 6365; *Blackwall, The*, 10 Wall.

such that any prudent man would have accepted an offer of service if it had been made.”²⁰

§ 3356. Impending peril—Degree of proof.—The courts do not require a strong degree of certainty in the proof establishing the peril; it is not necessary that the proof rise to a degree of probability. Salvage services cannot be made to rest on a certain basis, and nice distinctions as to the ultimate probability of the vessel being saved are not to be tolerated. It is sufficient if there is a probability, or, it seems, even a possibility that the peril would result in destruction if the service had not been rendered. The rule on this subject is thus stated by one federal court: “Now, it is not necessary to constitute a salvage service that the danger be immediate or absolute; it is sufficient that at the time the assistance is rendered the ship has encountered any danger or misfortune which might possibly expose her to destruction if the service were not rendered. A situation of actual apprehension, though not of actual danger, is sufficient.”²¹

²⁰ *Mira A. Pratt, The*, 31 Fed. 572; *Emulous, The*, 1 Sumn. (U. S.) 207, 8 Fed. Cas. No. 4480; *McConnochie v. Kerr*, 9 Fed. 50; *Long v. Tampico, The*, 16 Fed. 491; *Baker & Co. v. Excelsior, The*, 19 Fed. 436; *Fannie Brown, The*, 30 Fed. 215; *Wasp, The*, 34 Fed. 222; *Erin, The*, 36 Fed. 712; *Cachemire, The*, 38 Fed. 518; *S. A. Rudolph, The*, 39 Fed. 331; *Albany, The*, 42 Fed. 64; *New England & Co. v. M. Vandercook, The*, 45 Fed. 262; *Excelsior, The*, 48 Fed. 749; *Sirius, The*, 53 Fed. 611; *Barnegat, The*, 55 Fed. 92; *Dupuy de Lome, The*, 55 Fed. 93; *Compagnie Commerciale De Transport & Co. v. Charente & Co.*, 9 C. C. A. 292, 60 Fed. 921; *Rescue, The, v. George B. Roberts, The*, 64 Fed. 139; *Beaconsfield, The*, 67 Fed. 144; *Great Northern, The*, 72 Fed. 678; *George W. Clyde, The*, 80 Fed. 157; *Carrie, The*, 88 Fed. 983; *Thornley, The*, 39 C. C. A. 248, 98 Fed. 735; *Flottbek, The*, 55 C. C. A. 448, 118 Fed. 954; *Independence,*

The, 2 Curt. (U. S.) 350, 18 Law R. 151, 13 Fed. Cas. No. 7014; *John Gilpin, The, Olc. (U. S.)* 77, 13 Fed. Cas. No. 7345; *Baker v. Hemenway*, 2 Low. (U. S.) 501, 2 Fed. Cas. No. 770; *Cheeseman v. Two Ferry Boats*, 2 Bond (U. S.) 363, 5 Fed. Cas. No. 2633; *Hyderabad, The*, 11 Fed. 749, 755; *Ann L. Lockwood, The*, 37 Fed. 233, 237; *Ida L. Howard, The*, 1 Low. (U. S.) 2, 12 Fed. Cas. No. 6999; *Charlotte, The*, 3 W. Rob. 68.

²¹ *Saragossa, The*, 1 Ben. (U. S.) 551, 21 Fed. Cas. No. 12334; *Holmes v. Joseph C. Griggs, The*, 1 Ben. (U. S.) 81, 12 Fed. Cas. No. 6640; *Ella Constance, The*, 33 L. J. N. S. 191; *Plymouth Rock, The*, 9 Fed. 413; *McConnochie v. Kerr*, 9 Fed. 50; *Charlotte, The*, 3 W. Rob. 68; *Westminster, The*, 1 W. Rob. 229, 232; *Raikes, The*, 1 Hagg. Adm. 246; *Phantom, The*, 1 A. & E. 58. See also *Cottage City, The*, 136 Fed. 496.

§ 3357. **Derelict property.**—A vessel is said to be derelict when it is found on the seas forsaken and without any person in it. To answer to this definition the vessel must have been abandoned by its officers and crew without an intention of returning. When found in such condition it is the proper subject of salvage relief. The abandonment must ordinarily have been on some good, or apparently good, grounds and the proof must show in all such cases that the vessel was in great danger or imminent peril, and that the abandonment by the persons in charge was for the purpose of saving their lives. In such cases it is not required to prove that the master had no intention of returning to the vessel at any time; it is sufficient to show that the master and the crew abandoned the vessel on account of the imminent peril and danger to life and did not intend to return under the existing conditions, and that they did not contemplate returning to use their own exertions in further attempts at the time to save the vessel. The master's intention to return in case he cannot obtain assistance to save the vessel does not take away from it the legal character of derelict.²² On this definition one court said: "There is some vagueness about the definition of 'derelict' when applied to vessels abandoned at sea, but the general rule is that a vessel which is abandoned by her crew, without any purpose on their part of returning to the ship, or any hope of recovering it by their own exertions, comes strictly within the definition."²³

§ 3358. **Derelict property—Duty of finder.**—Where property is discovered which is derelict it is the right and the duty of the finder to take possession and make every reasonable effort to preserve it for the owner's benefit, with the object of salvage compensation. This right of the finder is thus stated: "The fact that property is found at sea or on the coast in peril, without the presence of any one to protect it, gives the finder a right to take it in his possession; and the law connects with such right the obligation to use the means he has at control, and with all reasonable promptitude, to save it for the owner."²⁴ It has been stated that "property is not, in the sense of

²² *Rowe v. Brig, The*, 1 Mason (U. S.) 372; *Laura, The*, 14 Wall. (U. S.) 336; *John Wurts, The, Olc.* (U. S.) 462, 13 Fed. Cas. No. 7434; *Fairfield, The*, 30 Fed. 700; *Cairnsmore, The*, 20 Fed. 519; *Burlington, The*, 73 Fed. 258; *B. C. Terry, The*, 9 Fed. 920; *Bee, The*, 1 Ware (U. S.) 332, 3 Fed. Cas. No. 1219; *Craigs, The, L. R.* 5 P. D. 186.
²³ 2 *Parson Shipp. & Adm.* 288; *Ann L. Lockwood, The*, 37 Fed. 233.
²⁴ *John Wurts, The, Olc.* (U. S.) 462, 13 Fed. Cas. No. 7434.

law, derelict, and the possession left vacant for the finder, until the *spes recuperandi* is gone and the *animus revertendi* is finally given up."²⁵

§ 3359. Towage as salvage.—The courts have made a distinction between towage as such and towage as salvage. The difference seems to depend on the proof of the situation of the vessel towed at the time such service is undertaken. Towage service as such is that which is rendered for the mere purpose of expediting the voyage of the vessel, without reference to any circumstances of danger. It is confined to vessels that have received no injury. The compensation for towage is payable where the vessel receiving the service is in the same condition she would ordinarily be in without having encountered any dangers or accidents. "It is the employment of one vessel to expedite the voyage of another."²⁶ But towage as salvage, assuming that this is a correct nautical term, is different from mere towage as such. In this sense it is simply salvage service. Whether the persons performing such service are to be paid by a salvage compensation depends upon the proof of the circumstances under which such services were performed. The correct rule is stated as follows: "When towage, therefore, is rendered to a disabled vessel, not with a view merely to expedite her passage from one place of safety to another, but with the obvious purpose of relief from some circumstances of danger, either present or reasonably to be apprehended, compensation upon salvage principles is to be allowed." And as in salvage cases generally, the application of the principle is not dependent upon the degree of danger, although this is important in fixing the amount of compensation.²⁷ And it has been held that an agreement to tow

²⁵ *Aquila, The*, 1 C. Rob. 37, 41; 3 Fed. 248; *Ehrman v. Swiftsure*, Ann L. Lockwood, *The*, 37 Fed. 233. *The*, 4 Fed. 463; *Lelpsic, The*, 5

²⁶ *Princess Alice, The*, 3 W. Rob. Fed. 108; *Atlas &c. Co. v. Colon*, 138; *Reward, The*, 1 W. Rob. 174, *The*, 4 Fed. 469; *Saragossa, The*, 177; *McConnochie v. Kerr*, 9 Fed. 1 Ben. (U. S.) 551; *Emily B. Souder, The*, 15 Blatchf. (U. S.) 413; *Sirius, The*, 53 Fed. 611; *Great Northern, The*, 72 Fed. 678. 185, 8 Fed. Cas. No. 4458; *Hennessey v. Versailles, The*, 1 Curt. (U. S.) 353, 11 Fed. Cas. No. 6365;

²⁷ *Plymouth Rock, The*, 9 Fed. 413; *Corwin v. Jonathan Chase, The*, 2 Fed. 268; *Brooks v. Adirondack, The*, 2 Fed. 387; *Mayo v. Clark*, 1 Fed. 735; *Athenian, The*, 3 W. Rob. 71; *Monticello, The*, 81 Fed. 211.

an imperiled vessel into port did not change the character of the service rendered from salvage to that of towage.²⁸

§ 3360. Amount of salvage—Circumstances control.—There are no fixed rules for estimating the amount of salvage or compensation in any given case. This depends on all the circumstances involved in the service, and is largely in the discretion of the court. The proof should show all facts and circumstances that may in any degree bear upon the question. Admiralty courts have frequently indicated the various circumstances which are proper to be considered in estimating the amount of salvage, and these constitute the only rules capable of statement as guides. Of these the important or leading circumstances are the value of the property saved, the degree and imminence of the danger, the proximity of other means of succor, the hazard, labor and skill of the salvors, the duration and difficulty of the service, the value of the vessel or vessels and property and the number of persons employed, and the danger to vessel and men in rendering the service, and in some cases the fact that the vessel was required to deviate from her voyage, together with the incidental risks and responsibilities thereby incurred.²⁹ In harbor cases where a large number of tugs are near, large salvage awards are contrary to the principles of law;³⁰ but the importance of maintaining wrecking companies with powerful and costly appliances, ready at any time, day or night, to aid vessels in peril, is an element to be considered.³¹ It is held that the salvors are entitled to a large per cent. where the value of the salved vessel is small.³² Where

²⁸ Dupuy de Lome, 55 Fed. 93. See also, *Sirius, The*, 6 C. C. A. 614, 57 Fed. 851.

²⁹ *Plymouth Rock, The*, 9 Fed. 413; *Sandringham, The*, 10 Fed. 556; *Murphy v. Sullote, The*, 5 Fed. 99; *Annie Henderson*, 15 Fed. 550; *Neto and Cargo, The*, 15 Fed. 819; *Egypt, The*, 17 Fed. 359, 367; *Queen of the Pacific, The*, 21 Fed. 459, 25 Fed. 610; *Baker, The*, 25 Fed. 771; *Boyne, The*, 98 Fed. 444; *Bay of Naples, The*, 44 Fed. 90, 48 Fed. 737; *Bowers v. European, The*, 44 Fed. 484; *A Lot of Whalebone*, 51 Fed. 916; *Blackwall, The*, 10 Wall. (U. S.) 1; *Connemara, The*, 108 U. S. 352, 2 Sup. Ct. 754; *Hennessey*

v. Versailles, The, 1 Curt. (U. S.) 353, 11 Fed. Cas. No. 6365; *Pope v. Sapphire, The*, 19 Fed. Cas. No. 11276; *Hand v. Elvira, The*, Gilp. (U. S.) 60, 11 Fed. Cas. No. 6015; *Grace Dollar, The*, 103 Fed. 665; *Clifton, The*, 3 Hagg. Adm. 117.

³⁰ *Murphy v. Sullote, The*, 5 Fed. 99; *O. C. Hanchett, The*, 76 Fed. 1003.

³¹ *Susan, The*, 1 Sprague (U. S.) 499, 23 Fed. Cas. No. 13630; *Coast Wrecking Co. v. Phoenix Ins. Co.*, 13 Fed. 127; *Egypt, The*, 17 Fed. 359; *City of Worcester, The*, 42 Fed. 913, 916; *St. Paul, The*, 30 C. A. 70, 82 Fed. 104, 86 Fed. 340.

³² *Wellington, The*, 52 Fed. 605;

a large amount of property is saved its exact value is a minor element in fixing salvage; and as the value increases the per cent. given rapidly decreased.³³ "The absence of other assistants is an important element, and should be taken into account in ascertaining the amount of a salvage award."³⁴ Where the amount of salvage might be increased by the dangers encountered by the salvors, as against this it is proper to consider the fact that a life saving crew was at hand ready to effect a rescue in case of accident.³⁵ Injuries received in the course of salvage service is proper to be considered in determining the amount of the award.³⁶ "The promptness of salvors in reaching the steamer and thus preventing her going further up the beach, and in getting everything in readiness to haul her off at the first possible opportunity, and thus avoiding the great damage incident to long continued grounding, is a most important element in this case."³⁷ Where a vessel is helplessly drifting towards others, which there is an apparent probability she will injure, and is rescued by salvors, the saving to the vessel or owners from the probable consequences is a proper element to be considered in fixing the amount of salvage.³⁸

§ 3361. Agreement for salvage services—Effect.—The courts are not unanimous on the effect of agreements for salvage services. In some instances the courts utterly ignore them; in others they accept the sum agreed upon as a measure of compensation for the salvor's services; while in others it operates as a bar to a claim for salvage. The claim for salvage does not rest upon an agreement either express or implied. In the absence of proof of an express contract, or proof of circumstances from which a contract could be implied the presumption of law is that the salvage enterprise was undertaken with the expectation that salvage would be paid in the regular and usual way out of the property saved.³⁹ As previously seen, compensation

Gambetta, The, 20 C. C. A. 417, 74 Fed. 259.

³³ *Rita, The*, 10 C. C. A. 629, 62 Fed. 761; *Gambetta, The*, 20 C. C. A. 417, 74 Fed. 259.

³⁴ *Boyne, The*, 98 Fed. 444; *Roman Prince, The*, 88 Fed. 336; *Monticello, The*, 81 Fed. 211, 214; *O. C. Hanchett, The*, 22 C. C. A. 678, 76 Fed. 1003; *Indiana, The*, 22 Fed. 925.

³⁵ *Haxby, The*, 28 C. C. A. 33, 83 Fed. 715.

³⁶ *Haxby, The*, 28 C. C. A. 33, 83 Fed. 715.

³⁷ *St. Paul, The*, 82 Fed. 104, 86 Fed. 340; *City of Worcester, The*, 42 Fed. 913.

³⁸ *Stebbins v. Five Mud Scows*, 50 Fed. 227.

³⁹ *Queen of the Pacific, The*, 21 Fed. 459.

or salvage depends on the success of the salvage enterprise; but under a valid contract salvage may be decreed where the proof shows that the venture was not successful. The rule established by an English court is that "when the services are rendered in pursuance of a request from the vessel in danger or distress, the party rendering them is entitled to recover salvage, according to the circumstances of the case, although such services prove to be of no benefit, while one who volunteers his services to a vessel under the same circumstances, if unsuccessful, is entitled to nothing. But in either case the law implies that the service is to be paid on the usual condition of the ultimate safety of the property in question."⁴⁰ It has been stated that "nothing short of a distinct agreement to pay the stipulated sum, whether the service be successful or not, will change the character of a salvage service into a mere ordinary contract of employment, or deprive it of its maritime lien."⁴¹

§ 3362. Agreement—Effect as a measure for amount of salvage. On the validity and effect of salvage contracts one district judge said: "It is true, as insisted by the respondent's counsel, that a contract of this character is not binding upon the court, and that in all cases of salvage it is competent for the court to adjudge and assess the amount of the recovery in accordance with the equities of the case; and, if it should appear that a contract of this character was an inequitable one, the court would, of course, disregard it. But whenever a contract has been entered into after due deliberation by the parties, and has not been shown to be in any respect an inequitable one, it is exceedingly valuable as evidence to enable the court to arrive at a just determination. The court regards this contract as evidence in that light, and not as a conclusive contract, but it is a most significant and valuable indication of what should be the true amount of the recovery."⁴²

§ 3363. Agreement valid—A bar to salvage claim.—The general principle is that if the proof shows a definite, distinct agreement,

⁴⁰ *Undaunted, The*, Lush. Adm. 90; 295; *Camanche, The*, 8 Wall. (U. S.) 448, 477.

Hennessey v. Versailles, The, 1 Curt. (U. S.) 353, 360; *Queen of the Pacific, The*, 21 Fed. 459.

⁴¹ *Chapman v. Engines of Greenpoint*, 38 Fed. 671; *Adams v. Bark Island City*, 1 Cliff. (U. S.) 210; *Louisa Jane, The*, 2 Low. (U. S.)

⁴² *Agnes I. Grace*, 2 C. C. A. 581, 49 Fed. 662, 51 Fed. 958; *Thonley, The*, 39 C. C. A. 248, 98 Fed. 735; *Elfrida, The*, 172 U. S. 186, 19 Sup. Ct. 186.

with ample time for the parties to consider their acts, and where it is not totally contrary to justice or equity, the courts will recognize such an agreement.⁴³ In such cases where the proof shows that a binding contract was made between the parties to pay for the services at all events, whether the property was lost or not, it has been held sufficient to bar a claim for salvage.⁴⁴

§ 3364. Agreement invalid—Evidence of need of aid.—The reason for courts declining to be bound by an agreement for salvage is that such agreements are usually made when one of the parties is in extremis, and that however fair the agreement may appear the maritime law recognizes that the necessity of immediate action may compel submission to a demand which would not otherwise be given. The objection is not answered by the suggestion that no advantage was taken on account of the position in which one contracting party

⁴³ *Post v. Jones*, 19 How. (U. S.) 150; *J. G. Paint, The*, 1 Ben. (U. S.) 545, 13 Fed. Cas. No. 7318; *Wellington, The*, 48 Fed. 475, 478; *Agnes I. Grace, The*, 2 C. C. A. 581, 51 Fed. 958; *Sirius, The*, 53 Fed. 611 (reversed in 57 Fed. 851); *Thornley, The*, 39 C. C. A. 248, 98 Fed. 735; *Costa Rica, The*, 3 Sawy. (U. S.) 610; *Emulous, The*, 1 Sumn. (U. S.) 207, 8 Fed. Cas. No. 4480; *Bearse v. Three Hundred and Forty Pigs Copper*, 1 Story (U. S.) 314, 2 Fed. Cas. No. 1193; *G. W. Jones, The*, 48 Fed. 925; *A. D. Patchin, The*, 1 Blatchf. (U. S.) 414, 1 Fed. Cas. No. 87; *Independence, The*, 2 Curt. (U. S.) 350, 13 Fed. Cas. No. 7014; *Alert, The*, 56 Fed. 721; *British Empire, The*, 6 Jur. 608; *Helen and George, The*, Swabey 368; *True Blue, The*, 2 W. Rob. 176; *Henry, The*, 2 Eng. Law & Eq. 564.

⁴⁴ *Adams v. Island City, The*, 1 Cliff. (U. S.) 210, 1 Fed. Cas. No. 55; *Centurion, The*, 1 Ware (U. S.) 477, 5 Fed. Cas. No. 2554; *H. B. Foster, The*, Abb. Adm. (U. S.) 222, 11 Fed. Cas. No. 6290; *Versailles,*

The, 28 Fed. Cas. No. 16924; *Coffin v. John Shaw, The*, 1 Cliff. (U. S.) 230, 5 Fed. Cas. No. 2949; *Collins v. Fort Wayne, The*, 1 Bond (U. S.) 476, 6 Fed. Cas. No. 3012; *Bowley v. Goddard*, 1 Low. (U. S.) 154, 3 Fed. Cas. No. 1736; *Louisa Jane, The*, 2 Low. (U. S.) 295, 15 Fed. Cas. No. 8532; *Harley v. Four Hundred and Sixty-seven Bars, etc.*, 1 Sawy. (U. S.) 1, 11 Fed. Cas. No. 6069; *Marquette, The*, 1 Bro. Adm. (U. S.) 364, 16 Fed. Cas. No. 9101; *Silver Spray, The*, 1 Bro. Adm. (U. S.) 349, 22 Fed. Cas. No. 12857; *Williams, The*, 1 Bro. Adm. (U. S.) 208, 29 Fed. Cas. No. 17710; *Independence, The*, 2 Curt. (U. S.) 350, 18 Law R. 151, 13 Fed. Cas. No. 7014; *William Lushington, The*, 7 Notes of Cases 361; *Emulous, The*, 1 Sumn. (U. S.) 207, 8 Fed. Cas. No. 4480; *Post v. Jones*, 19 How. (U. S.) 150; *Camanche, The*, 8 Wall. (U. S.) 448; *Elfrida, The*, 172 U. S. 186, 19 Sup. Ct. 146; *Delambre, The*, 9 Fed. 775; *Roanoke, The*, 50 Fed. 574; *Elphicke v. White Line &c. Co.*, 46 C. C. A. 56, 106 Fed. 945; *Helen & George, The*, Swabey 368.

is placed, as that position is the very foundation of the contract. It is evident that such contracts are not voluntary on the part of the owner or master of a ship. In such cases the rule has been established that "the amount agreed to by the master cannot be accepted as the measure of value of the services rendered, although the making of the contract may be considered as evidence of the great need of it, and the master's opinion of the immediate necessity of it."⁴⁵ But the courts refuse to recognize them as binding agreements in other respects.⁴⁶

§ 3365. Agreement—Burden of proof.—Where a claim is made for aiding a vessel in distress or for rescuing imperiled property at sea, naturally and ordinarily compensation is made in the way of salvage, the amount being determined by the court. Courts assume that all salvage services were undertaken on this presumption. If either party claims a different arrangement it is incumbent upon him to plead it specifically and the burden is upon him to prove it by a preponderance of the evidence.⁴⁷ It is never necessary to prove that the master obtained special authority in order to secure the services of salvors, as usually the circumstances do not admit of any delay, and his agency clothes him with such authority.⁴⁸

§ 3366. Claim for salvage—Forfeiture.—Salvage services may be rendered under such circumstances that will prevent the salvors from recovering. And a valid claim for salvage may be forfeited by the conduct of the salvors. Thus, under the first principle where the proof shows that the injury was caused or the peril brought about by the fault of the claimant, no salvage will be allowed.⁴⁹ And

⁴⁵ *Tennasserim, The*, 47 Fed. 119.

⁴⁶ *Jacob E. Ridgway*, 8 Ben. (U. S.) 179, 13 Fed. Cas. No. 7155; *Brooks v. Adirondack, The*, 2 Fed. 387; *Chapman v. Engines of Greenpoint*, 38 Fed. 671; *A. D. Patchin, The*, 1 Blatchf. (U. S.) 414, 1 Fed. Cas. No. 87; *Jenny Lind, The*, Newb. Adm. 443; *Emulous, The*, 1 Sumn. (U. S.) 207, 8 Fed. Cas. No. 4480; *G. W. Jones, The*, 48 Fed. 925; *Wexford, The*, 6 Ben. (U. S.) 119, 29 Fed. Cas. No. 17472; *Homely, The*, 8 Ben. (U. S.)

495; *Helen and George, The*, Swabey 368; *J. G. Paint, The*, 1 Ben. (U. S.) 545, 13 Fed. Cas. No. 7318; *Don Carlos, The*, 47 Fed. 746; *Thornley, The*, 39 C. C. A. 248, 98 Fed. 735.

⁴⁷ *Elphicke v. White Line &c. Co.*, 46 C. C. A. 56, 106 Fed. 945; *Camanche, The*, 8 Wall. (U. S.) 448.

⁴⁸ *A. D. Patchin, The*, 1 Blatchf. (U. S.) 414, 1 Fed. Cas. No. 87; *G. W. Jones, The*, 48 Fed. 925; *Mira A. Pratt, The*, 31 Fed. 572.

under this principle it was held that where a breach of a contract contributed to place the salved vessel in danger and peril, no compensation could be allowed.⁵⁰ So it has been held that the lack of skillful operation with or without injurious result may diminish the reward, and "specific negligence approximately resulting in distinguishable injury to the vessel may be used in an action for salvage either to diminish or defeat compensation and in an action by the owners of the property, when culpable negligence is established against the salvors, resulting in injury, damages therefor may be recovered against him."⁵¹ And it has been held that injury to the salved vessel during the attempt to save it may diminish the award in the absence of any proof of negligence.⁵²

⁵⁰ Samuel H. Crawford, *The*, 6 Fed. 906; Chas. E. Soper, *The*, 19 Fed. 844; Minnie C. Taylor, *The*, 52 Fed. 323.

⁵¹ *Krona, The*, 28 Fed. 318.

⁵² Henry Steers, Jr., *The*, 110 Fed. 578; *Mulhouse, The*, 22 Law R. 276, 17 Fed. Cas. No. 9910; *Serviss v. Ferguson*, 28 C. C. A. 327, 84 Fed. 202; *Algitha, The*, 17 Fed. 551; *Dygden, The*, 1 Notes of Cases 115; *Cape Packet, The*, 3 W. Rob. 122;

Duke of Manchester, The, 2 W. Rob. 470; *Neptune, The*, 1 W. Rob. 297.

⁵³ *Haxby, The*, 28 C. C. A. 33, 83 Fed. 715; *Bremen, The*, 111 Fed. 228; *Pine Forest, The*, 119 Fed. 999; *Merritt & Co. v. North German Lloyd*, 120 Fed. 17. For a review of cases as to salvage wards and their amount, in the federal courts, see *Theta, The*, 135 Fed. 129; note to *Lamington, The*, 30 C. C. A. 280.

CHAPTER CLXVII.

COLLISIONS.

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3367. Burden of proof.	3381. Absence of lookout—Burden of proof.
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3379. Collision with vessel at anchor—Burden and prima facie case.	3393. Contributory negligence does not prevent recovery—Exceptions.
3380. Absence of lookout—Prima facie case.	3394. What damages recoverable.
	3395. Proof of usage.

§ 3367. **Burden of proof.**—The general rule on the question of the burden of proof applies in admiralty in cases of collision. In this class of cases no presumptions arise from the fact of the accident in the absence of evidence showing a violation of statute or of the rules of maritime law. The rule, therefore, is that when a libellant alleges that there was a collision and that his vessel suffered damages by reason thereof, the burden of proof is upon him to show by a fair preponderance of the evidence that the collision happened substantially

as alleged and that it was the cause of the injury.¹ The rule in admiralty is the same as that at common law, that the plaintiff must make out his case by a preponderance of the evidence; and if he leaves the question of fault or negligence in doubt, he is not entitled to recover.² This rule as to the burden of proof is carried to the extent of holding that if the evidence leaves a reasonable doubt as to which vessel was in fault, the loss must be sustained by the party on whom it has fallen.³

§ 3368. Inscrutable fault—Rule.—Under the decisions of the courts and the rules of admiralty there are cases of collision that come under the rule designated as that of inscrutable fault. This term was thus defined: "Cases of inscrutable fault are those wherein the court can see that a fault has been committed, but is unable, from the conflict of testimony or otherwise, to locate it." The earlier cases and some of the law writers made no distinction between cases of mutual fault, inscrutable fault, and inscrutable accident; and under the rule thus established the damages were divided in all cases where the proof showed that the collision was not the fault of one party only. And this rule has been adopted by some courts in this country.⁴

¹ *Bergen v. Joseph Stickney, The*, 1 Fed. 624; *Middlesex &c. Co. v. Albert Mason, The*, 2 Fed. 821; *Amanda Powell, The*, 14 Fed. 486; *David Dows, The*, 16 Fed. 154; *Edwin H. Webster, The*, 18 Fed. 724; *Joseph W. Gould, The*, 19 Fed. 785; *Morten v. Five Canal-Boats*, 24 Fed. 500; *Butterfield v. Boyd*, 4 Blatchf. (U. S.) 356, 4 Fed. Cas. No. 2250; *Summit, The*, 2 Curt. (U. S.) 150, 23 Fed. Cas. No. 13606; *Kallisto, The*, 2 Hughes (U. S.) 128, 14 Fed. Cas. No. 7600; *Corks v. Belle, The*, 6 Fed. Cas. No. 3231a; *Bessie Morris, The*, 13 Fed. 397; *Saunders v. Hanover, The*, 2 Quart. L. J. 1, 21 Fed. Cas. No. 12374; *Morgan v. Sim*, 11 Moore P. C. 307.

² *Worthington and Davis, The*, 19 Fed. 836, 839; *Ludwig Holberg, The*, 157 U. S. 60, 15 Sup. Ct. 477; *City*

of New York, The, 147 U. S. 72, 13 Sup. Ct. 211; *Catherine of Dover*, 2 Hagg. Adm. 145, 154; *Rockaway*, 2 Stu. Vice-Adm. 129; *City of London, The*, Swabey 300; *Maid of Auckland*, 6 Notes of Cas. 240.

³ *Grace Girdler, The*, 7 Wall. (U. S.) 196; *Kallisto, The*, 2 Hughes (U. S.) 128, 14 Fed. Cas. No. 7600; *Cherokee, The*, 15 Fed. 119; *Worthington and Davis, The*, 19 Fed. 836; *City of London, The*, Swabey 300; *Catherine of Dover*, 2 Hagg. Adm. 145, 154; *Rockaway*, 2 Stu. Vice-Adm. 129; *Maid of Auckland*, 6 Notes of Cas. 240.

⁴ *John Henry*, 3 Ware (U. S.) 264, 13 Fed. Cas. No. 7350; *David Dows, The*, 16 Fed. 154; *Scioto, The*, 2 Ware (U. S.) 360, 21 Fed. Cas. No. 12508; *Fanny Fern, The*, Newb. (U. S.) 158.

But the weight of the authorities is in favor of the proposition that in case of inscrutable fault there can be no recovery.⁵

§ 3369. **Inevitable accident.**—As elsewhere shown no recovery can be had by either party where the disaster is attributable to inevitable accident. It therefore becomes important to know the legal meaning of this term. The United States Supreme Court said of it: “Inevitable accident is where a vessel is pursuing a lawful avocation in a lawful manner, using the proper precautions against danger, and an accident occurs. The highest degree of caution that can be used is not required. It is enough that it is reasonable under the circumstances—such as is usual in similar cases, and has been found by long experience to be sufficient to answer the end in view—the safety of life and property.”⁶ The Supreme Court of the United States also say of it: “Inevitable accident, as applied to such a case, must be understood to mean a collision which occurs when both parties have endeavored by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident.”⁷ In cases of disaster by the perils of navigation or inevitable accident, it is held that there is no division of loss, but where neither is to blame it must fall wholly upon him who suffers.⁸

§ 3370. **Presumption of fault.**—The proof of certain facts or circumstances may raise a presumption of fault or negligence. A common and familiar illustration of this proposition is found in the cases where the evidence shows that at the time of a collision a vessel was violating some statutory regulation or a law of navigation, intended to prevent collisions; in any such case there arises a reasonable presumption that such fault or negligence, if not the sole cause, was at

⁵ *Breeze, The*, 6 Ben. (U. S.) 14, 4 Fed. Cas. No. 1829; *Summit, The*, 2 Curt. (U. S.) 150, 23 Fed. Cas. No. 13606; *Worthington and Davis, The*, 19 Fed. 836; *Grace Girdler, The*, 7 Wall. (U. S.) 196.

⁶ *Grace Girdler, The*, 7 Wall. (U. S.) 196, 203; *Cherokee, The*, 15 Fed. 119; *Atlanta, The*, 41 Fed. 639; *Leland, The*, 19 Fed. 771; *Baltic, The*, 2 Ben. (U. S.) 452, 2 Fed. Cas. No. 823; *Ward v. Fashion, The*, Newb. 8, 6 McLean (U. S.) 152, 29 Fed.

Cas. No. 17154; *Indus, The*, 6 Asp. (N. S.) 105.

⁷ *Morning Light, The*, 2 Wall. (U. S.) 550; *Leland, The*, 19 Fed. 771; *Marpesia, The*, L. R. 4 P. C. 212, 1 Asp. (N. S.) 261; *Virgil, The*, 2 W. Rob. 201, 205.

⁸ *Stainback v. Rae*, 14 How. (U. S.) 532; *John Fraser, The*, 21 How. (U. S.) 184; *Grace Girdler, The*, 7 Wall. (U. S.) 196; *Morning Light, The*, 2 Wall. (U. S.) 550; *Chickasaw, The*, 38 Fed. 358.

least a contributory cause of the collision.⁹ But it has been held that "where everything about the case indicates a reasonable degree of diligence, the probability that the ship complied with her duty is *prima facie* established."¹⁰

§ 3371. Complaining vessel at fault—Degree and burden of proof. Where the uncontradicted testimony shows that the complaining vessel was at fault, and such fault was of itself sufficient to account for the disaster, it is then incumbent upon her, to entitle her to recover, to do more than raise a doubt in regard to the negligent management of the other vessel. In such case a presumption arises against the complaining vessel, and any reasonable doubt thus raised in regard to the management of the adversary vessel will be resolved in its favor.¹¹ So it is held that negligence on the part of the complaining vessel will not prevent a recovery where the evidence shows that the disaster would have happened by reason of the negligence of the other vessel notwithstanding the negligence of the complainant.¹²

§ 3372. Both vessels at fault—Division of damages.—The rule seems to be almost universally adopted that where the evidence shows that both vessels were at fault in a collision, the damages will be divided. On this subject the Supreme Court of the United States say: "If there has been, on the part of plaintiff, such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. By the rule of the admiralty courts, where there has been such contributory negligence, or, in other words, when both have been in fault, the entire damages resulting from the collision must be equally divided between the parties. This rule of the admiralty commends itself quite as favorably in its influence in securing practical justice as the other, and the plaintiff, who has the selection of the forum in which he will litigate

⁹ *Pennsylvania, The*, 19 Wall. (U. S.) 125; see, *Bothnia, The*, Lush. Adm. 52; *Eagle Wing, The*, 135 Fed. 826.

¹⁰ *Charles L. Jeffrey, The*, 5 C. C. A. 246, 55 Fed. 685; *H. F. Dimock, The*, 23 C. C. A. 123, 77 Fed. 226. But see, *Admiral Schley, The*, 131 Fed. 433.

¹¹ *City of New York, The*, 147 U. S. 72, 13 Sup. Ct. 211; *Ludwig Holberg, The*, 157 U. S. 60, 15 Sup. Ct. 477; *Mexico, The*, 28 C. C. A. 472, 84 Fed. 504; *Columbian, The*, 41 C. C. A. 150, 100 Fed. 991; *Carbonero, The*, 45 C. C. A. 314, 106 Fed. 329; *Oregon, The*, 158 U. S. 186, 15 Sup. Ct. 304; *Saunders v. Hanover, The*, 2 Quart. L. J. 1, 21 Fed. Cas. No. 12374. See also, *Georgetown, The*, 135 Fed. 854.

¹² *Columbian, The*, 41 C. C. A. 150, 100 Fed. 991.

cannot complain of the rule of that forum. It is not intended to say that the principles which determine the existence of mutual fault on which the damages are divided in admiralty, are precisely the same as those which establish contributory negligence at law that would defeat the action."¹³ And it has been held that the division of damages will be equal to each vessel, regardless of the difference in value. It has been said that: "Nothing, then, is more just than a contribution by moieties."¹⁴ But there are cases holding that although both vessels are in fault, yet where there is shown to be great disparity of fault and there are cross-suits, the loss will be apportioned in the ratio of such disparity.¹⁵

§ 3373. Comparative fault—Division of damages.—"Even gross fault committed by one of two vessels approaching each other from opposite directions does not excuse the other from observing every proper precaution to prevent a collision; and when, if such precaution had been observed the collision would have been avoided, the loss should be divided."¹⁶ In a more recent case one federal court admitted that it might still be regarded an open question "whether apportionment is the rule where the fault is inscrutable, as well as when both vessels are in fault, or whether only when both vessels are in fault."¹⁷ But in England since the act of 1873 this rule of the division of damages has been adopted and applied in cases only where both ships are in fault.¹⁸

¹³ *Atlee v. Packet Co.*, 21 Wall. (U. S.) 389; *Catherine v. Dickinson*, 17 How. (U. S.) 170; *America, The*, 92 U. S. 432; *Mason v. William Murtaugh*, 3 Fed. 404; *Williams v. Wm. Cox*, 3 Fed. 645; *William Cox, The*, 9 Fed. 672; *Ant, The*, 10 Fed. 294; *Alabama, The*, 10 Fed. 394; *Memphis &c. Co. v. H. C. Yeager &c. Co.*, 10 Fed. 395; *Connolly v. Ross*, 11 Fed. 342; *Roman, The*, 12 Fed. 219; *Monticello, The*, 15 Fed. 474; *B and C, The*, 18 Fed. 543; *Explorer, The*, 20 Fed. 135; *Clarion, The*, 27 Fed. 128; *Max Morris, The*, 28 Fed. 881; *Fred. W. Chase, The*, 31 Fed. 91; *Celt, The*, 3 Hagg. Adm. 328, n.; *Washington, The*, 5 Jur. 1067; *De Vaux v. Salvador*, 4 Ad. & E. 420, 431; *Friends, The*, 4 Moo.

P. C. 314; *Monarch, The*, 1 W. Rob. 21; *Seringapatam, The*, 5 Notes of Cas. 61; *Dowell v. General Steam Nav. Co.*, 5 El. & Bl. 195, 85 E. C. L. 194; *Oratava, The*, 5 Mo. Law Mag. 45; *De Cock, The*, 5 Mo. Law Mag. 303; *Abbott Shipping* 231, 232; see, §§ 3391, 3392.

¹⁴ *Scioto, The*, 2 Ware (U. S.) 360, 21 Fed. Cas. No. 12508; *Fanny Fern, The, Newb.* (U. S.) 158; *Abbott Ship*. 301.

¹⁵ *Mary Ida, The*, 20 Fed. 741. See also, *Philip Minch, The*, 128 Fed. 578.

¹⁶ *Pegasus, The*, 19 Fed. 46; *Maria Martin, The*, 12 Wall. (U. S.) 31.

¹⁷ *Max Morris, The*, 28 Fed. 881.

¹⁸ *Woodrop-Sims, The*, 2 Dods. 83; *Max Morris, The*, 28 Fed. 881.

§ 3374. Both vessels at fault—Damage to third.—The rule that where both vessels are at fault the damages are divided does not apply in a case of injury to an innocent third person by reason of the concurrent fault of two vessels. A party without fault injured by the combined negligence of two or more wrongdoers may proceed against either or both of the offenders for his entire loss.¹⁹

§ 3375. Violating statutory duty—Burden of proof.—In a certain class of collision cases the rule as to the burden of proof is extended. This class includes mainly cases where it is made to appear by the evidence that at the time of the collision the vessel was violating a positive statute or a familiar maritime law, intended for the prevention of collisions. In such cases the burden is upon the vessel thus violating such rules to show not only that this fault might not have been one of the causes, or that it probably was not, but it is required to go further and to establish by a fair preponderance that the particular violation of a statute or of the law of navigation could not have contributed to or resulted in the disaster.²⁰ This rule has been otherwise stated thus: "Every doubt to the preformance of duty, and the effect of non-performance should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary."²¹ The United States Supreme Court, speaking of this rule, said: "And in any case of collision, whenever it appears that one of the vessels has neglected the usual and proper measures of precaution, the burden is on her to show that the collision was not owing to her neglect."²² The cases seem to make some distinction between vessels violating statutory provision and those which fail or neglect to comply with the usual measures of precaution.²³

¹⁹ *Franconia, The*, 16 Fed. 149; *Alabama and Gamecock, The*, 92 U. S. 695; *Atlas, The*, 93 U. S. 302.

²⁰ *Pennsylvania, The*, 19 Wall. (U. S.) 125; *Farragut, The*, 10 Wall. (U. S.) 334; *Dentz, The*, 26 Fed. 40, 29 Fed. 525; *Waring v. Clarke*, 5 How. (U. S.) 441; *Grace Girdler, The*, 7 Wall. (U. S.) 196; *Belden v. Chase*, 150 U. S. 674, 14 Sup. Ct. 264; *Martello, The*, 153 U. S. 64, 14 Sup. Ct. 723; *Britannia, The*, 153

U. S. 130, 14 Sup. Ct. 795; *B. B. Saunders, The*, 19 Fed. 118.

²¹ *Arladne, The*, 13 Wall. (U. S.) 475.

²² *Great Republic, The*, 23 Wall. (U. S.) 20; *Newport, The*, 5 Ben. (U. S.) 231, 14 Int. Rev. Rec. 37, 18 Fed. Cas. 10185; *Lion, The*, 1 Sprague (U. S.) 40, 5 Fed. Cas. No. 2786.

²³ *Great Republic, The*, 23 Wall. (U. S.) 20; *Nacoochee, The*, 137 U.

§ 3376. **Violating maritime laws—Justification.**—A violation of the laws of navigation is justifiable only “where there is some special cause rendering a departure necessary to avoid immediate danger, such as the nearness of shallow water, or a concealed wreck, the approach of a third vessel, or something of that kind.”²⁴ As stated in another case, this exception is: “there may be extreme cases where departure from their requirements is necessary to avoid impending peril, but only to the extent that such danger demands.”²⁵ According to the English rule, where a steamer is libelled for having omitted to do something which it is claimed she ought to have done, the burden is on the libellant to prove three things: (1) That the thing omitted to be done was clearly within her power to do; (2) that if done it would probably have avoided the collision; (3) that it was an act which would have occurred to any competent and experienced officer in command.²⁶

§ 3377. **Steamers must keep out of way—Burden of proof.**—The law, for obvious reasons, places the duty upon steamers, that is, all vessels propelled by steam, to keep out of the way of other vessels. And this duty to keep out of the way is held to mean the duty of keeping away by prudent and safe margin having reference to all the dangers and contingencies of navigation.²⁷ And it is held to be the rule that under such circumstances the steamer must, at her own peril, leave a safe margin against the contingencies of navigation and also the effect of tide currents.²⁸ The burden is on the vessel which was bound to keep out of the way to show by a fair preponderance of the evidence that the collision was due to the fault of the other vessel.²⁹

S. 330, 11 Sup. Ct. 122; *Lion, The*, 1 Sprague (U. S.) 40, 5 Fed. Cas. No. 2786; *Newport, The*, 5 Ben. (U. S.) 231, 14 Int. Rev. Rec. 37, 18 Fed. Cas. No. 10185; *H. F. Dimock, The*, 23 C. C. A. 123, 77 Fed. 226; *Columbian, The*, 41 C. C. A. 150, 100 Fed. 991; *Carbonero, The*, 45 C. C. A. 314, 106 Fed. 329.

²⁴ *Maggie J. Smith, The*, 123 U. S. 349, 8 Sup. Ct. 159.

²⁵ *Belden v. Chase*, 150 U. S. 674, 14 Sup. Ct. 464; *Oregon, The*, 158 U. S. 186, 15 Sup. Ct. 804.

²⁶ *City of Antwerp, The*, L. R. 2 P. C. 25.

²⁷ *Wells v. Armstrong*, 29 Fed. 216; *Aurania and Republic, The*, 29 Fed. 98, 125; *Ogemaw, The*, 32 Fed. 919; *New Jersey, The, Olc.* (U. S.) 415, 18 Fed. Cas. No. 10161; *Whitney v. Empire State, The*, 1 Ben. (U. S.) 57, 29 Fed. Cas. No. 17586.

²⁸ *City of Springfield, The*, 29 Fed. 923; *Ogemaw, The*, 32 Fed. 919; *James M. Thompson, The*, 12 Fed. 189; *Carroll, The*, 8 Wall. (U. S.) 302.

²⁹ *Gypsum Prince, The*, 14 C. C. A. 573, 67 Fed. 612. See also, *Georgetown, The*, 135 Fed. 854; *Donald v. Guy*, 135 Fed. 429.

§ 3378. **Steamer and sailing vessel—Prima facie liability.**—Under the rule of maritime law it is the duty of a steamer, when approaching a sailing vessel in such a position as to involve risk of collision, to keep out of the way; and it is the duty of the sailing vessel to maintain her course. A failure on the part of the steamer to discharge this duty renders her prima facie liable in case of a collision, in the absence of the proof of any fault on the part of the sailing vessel. If the steamer fails to exercise all necessary precautions to avoid the risk of collision, she is presumptively chargeable. But if it is shown that she adopted efficient measures, such that would have been effective if the schooner had not changed her course, she is thereby exonerated.⁸⁰ But if the master of the sailing vessel contributes to the loss by his negligence, his recovery against the steamer will be confined to one-half of the damages of the sailing vessel.⁸¹

§ 3379. **Collision with vessel at anchor—Burden and prima facie case.**—When a steamer or sailing vessel collides with one at anchor, or without sail, the burden of proof is on such steamer or sailing vessel to show that she was without fault, and that every practical effort was made to avoid the collision.⁸² But in such a case it has been held that the burden was also on the libellant to show that his vessel was anchored in a proper place, and that he made a prima facie case when he proved this fact together with the fact of the collision, and that the burden was then shifted to the libelled vessel to show that it was

⁸⁰ *New York &c. Co. v. Philadelphia &c. Co.*, 22 How. (U. S.) 461; *New York &c. Co. v. Rumball*, 21 How. (U. S.) 372; *New York &c. Co. v. Calderwood*, 19 How. (U. S.) 241; *Potomac, The*, 8 Wall. (U. S.) 590; *Sea Gull, The*, 23 Wall. (U. S.) 165; *Colorado, The*, 91 U. S. 692; *S. C. Tryon, The*, 105 U. S. 267; *Pilot Boy, The*, 53 C. C. A. 329, 115 Fed. 873; *Columbia, The*, 27 Fed. 238; *New York &c. Co. v. Rumball*, 21 How. (U. S.) 372; *Carroll, The*, 8 Wall. (U. S.) 302; *Scotia, The*, 14 Wall. (U. S.) 170; *City of Antwerp, The*, L. R. 2 P. C. 25; *Haney v. Louisiana, The*, 6 Am. L. Reg. 422, 11 Fed. Cas. Nos. 6020, 6021; *Jay Gould, The*, 19 Fed. 765; *Columbia,*

The, 41 C. C. A. 150, 100 Fed. 991; *New Jersey, The, Olc.* (U. S.) 415, 18 Fed. Cas. No. 10161; *Fashion, The, Newb.* 8, 6 McLean (U. S.) 152, 29 Fed. Cas. No. 17154.

⁸¹ *Farnley, The*, 8 Fed. 629.

⁸² *Scioto, The*, 2 Ware (U. S.) 360, 21 Fed. Cas. No. 12508; *Amoskeag &c. Co. v. John Adams, The*, 1 Cliff. (U. S.) 404, 1 Fed. Cas. No. 338; *New York &c. Co. v. Calderwood*, 19 How. (U. S.) 241; *Granite State, The*, 3 Wall. (U. S.) 310; *Louisiana, The*, 3 Wall. (U. S.) 164; *Buffalo, The*, 50 Fed. 630; *Baltic, The*, 2 Ben. (U. S.) 452, 2 Fed. Cas. No. 823; *D. H. Miller, The*, 22 C. C. A. 597, 76 Fed. 877; *John H. Starin, The*, 113 Fed. 419.

without fault or that the disaster was the result of fault on the part of the libellant.³³ So, where a steamboat set adrift a flat from which she had been coaling, the burden of proof is on the vessel to show that the act was proper and that there was no fault on her part.³⁴ Where the evidence shows that a vessel under sail collided with one without sail or at anchor, it is held to be sufficient prima facie proof of fault, on the part of the vessel under sail. The reason is that she has the power of changing her course and thus avoiding the accident.³⁵

§ 3380. Absence of lookout—Prima facie case.—It is a rule of maritime law that every steamboat navigating waters where there are a large number of sailing vessels should have a trustworthy and constant lookout besides the helmsman. And under such circumstances when the evidence shows a collision between a steamboat and sailing vessel and the evidence further shows that there was no lookout on the steamboat besides the helmsman, or that the lookout was not properly stationed, or that he was careless or negligent in the discharge of his duty, it has been held that such facts constitute sufficient prima facie evidence of the fact that the collision was due to the fault of the steamer.³⁶ On the question of the effect of the absence of a sufficient lookout a district court said: "The want of a proper lookout, it is true, is immaterial, if it in no way contributed to the accident; but the question here is whether the lights visible from the one vessel to the other were in fact correctly seen and noted; and whether the witnesses, in the accounts they give, did see what they now profess to have seen. The presence or absence of a proper look-

³³ *Amoskeag &c. Co. v. John Adams, The*, 1 Cliff. (U. S.) 404, 1 Fed. Cas. No. 338; *Telegraph, The*, 1 Spink 427.

³⁴ *Chickasaw, The*, 38 Fed. 358.

³⁵ *Scioto, The*, 2 Ware (U. S.) 360, 21 Fed. Cas. No. 12508; *Strout v. Foster*, 1 How. (U. S.) 89; *Carroll, The*, 8 Wall. (U. S.) 302; *Amoskeag &c. Co. v. John Adams, The*, 1 Cliff. (U. S.) 404, 1 Fed. Cas. No. 338; *Ogemaw, The*, 32 Fed. 919; *Bothnia, The*, Lush. Adm. 52; *Indus, The*, 6 Asp. (N. S.) 105; *City of Peking, The*, 6 Asp. (N. S.) 396.

³⁶ *Genesee Chief v. Fitzhugh*, 12 How. (U. S.) 443; *St. John v.*

Paine, 10 How. (U. S.) 557; *Catherine v. Dickinson*, 17 How. (U. S.) 170, 177; *New York, The, v. Rea*, 18 How. (U. S.) 223; *Chamberlain v. Ward*, 21 How. (U. S.) 548; *Haney v. Baltimore &c. Co.*, 23 How. (U. S.) 293; *Ottawa, The*, 3 Wall. (U. S.) 268; *Colorado, The*, 91 U. S. 692, 699; *Ant, The*, 10 Fed. 294; *New York, The, v. Rea*, 18 How. (U. S.) 223; *George W. Roby, The*, 49 C. C. A. 481, 111 Fed. 601; *Pilot Boy, The*, 53 C. C. A. 329, 115 Fed. 873; *Comet, The*, 9 Blatchf. (U. S.) 323, 6 Fed. Cas. No. 3051; *Monticello, The*, 15 Fed. 474; *Leland, The*, 19 Fed. 771.

out, and the position of the witnesses, and the probabilities of correct observation, are of the greatest importance, where the accounts given are irreconcilable."²⁷

§ 3381. Absence of lookout—Burden of proof.—The absence of a lookout, as shown by the preceding section, is sufficient *prima facie* proof of negligence. But the burden to overcome this *prima facie* case rests upon the vessel sailing without such lookout; and this burden increases in weight as the dangers of navigation increase. In an action where great vigilance was required a federal court said: "But the absence of the lookout from duty, under the circumstances of this case, was flagrant negligence, and the burden of showing that the collision could not have been guarded against by a lookout rests heavily upon the Roby (the libelant)."²⁸

§ 3382. Burden on vessel having wind free.—It seems to be the settled rule of maritime law that where a vessel having the wind free collides with another that is close-hauled, the burden is on the former to show a sufficient excuse for not avoiding the collision.²⁹ The principle was more fully stated by Judge Betts as follows: "The rule of law is explicit that a vessel running with the wind free must take the risk of avoiding another sailing on a wind, when the two meet in opposite course, if the free vessel has the opportunity and means, if properly used, of so doing. Indeed, the usage for the vessel on the wind to hold her course, and for the one sailing free to give way

²⁷ *Excelsior, The*, 12 Fed. 195, 201; *Farragut, The*, 10 Wall. (U. S.) 334; *Fannie, The*, 11 Wall. (U. S.) 238, 243; *Golden Grove, The*, 13 Fed. 674; *Catherine v. Dickinson*, 17 How. (U. S.) 70.

²⁸ *George W. Roby, The*, 49 C. C. A. 481, 111 Fed. 601; *Lyndhurst, The*, 92 Fed. 681; *Farragut, The*, 10 Wall. (U. S.) 334; *Ariadne, The*, 13 Wall. (U. S.) 475, 479; *Oregon, The*, 158 U. S. 186, 15 Sup. Ct. 804; *Robinson v. Navigation Co.*, 20 C. C. A. 86, 73 Fed. 883; *Meyers &c. Co. v. Emma Kate Ross, The*, 41 Fed. 826; *Wilders S. S. Co. v. Low*, 50 C. C. A. 473, 112 Fed. 161; *Arthur M. Palmer, The*, 115 Fed. 417; *Pilot*

Boy, The, 53 C. C. A. 329, 115 Fed. 873.

²⁹ *Clement, The*, 2 Curt. (U. S.) 363, 5 Fed. Cas. No. 2879; *Clement, The*, 1 Sprague (U. S.) 257, 5 Fed. Cas. No. 2880; *Rebecca, The*, *Blatchf. & H. (U. S.)* 347, 20 Fed. Cas. No. 11618; *St. John v. Paine*, 10 How. (U. S.) 557; *Osseo, The*, 8 Ben. (U. S.) 518, 18 Fed. Cas. No. 10607; *Freddie L. Porter, The*, 8 Fed. 170; *Douglass, The*, 1 Bro. Adm. (U. S.) 105, 7 Fed. Cas. No. 4031; *Thames, The*, 5 C. Rob. 345, 348; *Baron Holberg, The*, 3 Hagg. Adm. 244; *Woodrop-Sims, The*, 2 Dods. 83.

in such case, has become a rule of law which imposes the damages and losses occasioned by its non-observance upon the vessel which disobeys the rule, unless it be clearly proved that her misconduct in no way contributed to the injury."⁴⁰ An omission of duty on the part of one vessel may be a fault bearing so little proportion to the greater faults of the other vessel that the first will not be held to bear any part of the consequences of the collision.⁴¹

§ 3383. Vessel adrift—Burden and presumption.—In such cases the rule as to the burden of proof is that where it appears that the collision was caused by a vessel drifting from her moorings a liability is sufficiently established unless the drifting vessel can affirmatively show that such drifting was "the result of inevitable accident, or a vis major, which human skill and precaution, and a proper display of nautical skill could not have prevented."⁴² Proof that the disaster was occasioned by a vessel adrift is prima facie proof sufficient to establish negligence on the part of the vessel adrift, or on the part of the persons who set her adrift.⁴³ The rule as to the burden and prima facie proof was thus stated by one district court: "The burden of proof is on the vessel adrift to excuse herself, and prima facie she is negligent, unless her owners can show due diligence, when she collides with one harmlessly and faultlessly at anchor."⁴⁴

§ 3384. Towing vessel—Liability for collision with towed vessel. A steamer or tug which undertakes to tow a vessel is liable for injuries occasioned by a collision with the vessel towed. The duty of the tow boat not to cause injury to the vessel in tow is one that is imposed by law, and does not arise out of contract. In such cases the tow boat is liable for damages caused by her own negligence,

⁴⁰ *Emily, The, Olc.* (U. S.) 132, 8 Fed. Cas. No. 4453; *Rebecca, The*, 1 Blatchf. & H. (U. S.) 347, 20 Fed. Cas. No. 11618; *Blossom, The, Olc.* (U. S.) 188, 3 Fed. Cas. No. 1564; *Argus, The, Olc.* (U. S.) 304, 1 Fed. Cas. No. 521; *Maria and Elizabeth, The*, 7 Fed. 253; *Saunders v. Hanover, The*, 2 Quarterly L. J. 1, 21 Fed. Cas. No. 12374; *Carll v. Erastus Wiman, The*, 20 Fed. 245.

⁴¹ *Great Republic, The*, 23 Wall. (U. S.) 20.

⁴² *Louisiana, The*, 3 Wall. (U. S.) 164; *Granite State, The*, 3 Wall. (U. S.) 310; *Fremont, The*, 3 Sawy. (U. S.) 571, 9 Fed. Cas. No. 5094; *Jeremiah Godfrey, The*, 17 Fed. 738; *Chickasaw, The*, 41 Fed. 627.

⁴³ *Chickasaw, The*, 38 Fed. 358.

⁴⁴ *Chickasaw, The*, 38 Fed. 358; *A. R. Wetmore, The*, 5 Ben. (U. S.) 147, 2 Fed. Cas. No. 569; *Jeremiah Godfrey, The*, 17 Fed. 738; *Brady, The*, 24 Fed. 300.

and proof of an agreement that the boat was to be towed at her own risk is held not sufficient to exempt the tow boat from liability.⁴⁵ But this rule is subject to the exception that if the vessel towed is old and not staunch and strong, the owner is bound to give notice of such fact to the towing vessel, and in the absence of such notice he can only claim the benefit of ordinary care in the handling of the vessel.⁴⁶

§ 3385. Collision in fog.—It appears from the decided cases and is the result of nautical experience that a large number, perhaps a vast majority of maritime collisions, occur during fogs. By reason of this fact statutes have been enacted and usages of the sea adopted as rules of navigation for the purpose of insuring greater safety in these times of extreme danger. The proof of violation of any of these enactments or rules is ordinarily sufficient to establish a *prima facie* case of negligence.

§ 3386. Rate of speed during fog.—The first and most important rule for the prevention of collisions in fogs is that which controls the rate of speed at such times. No absolute rule is given as to the particular rate of speed, but proof of excessive speed under all the circumstances is held sufficient to establish negligence.⁴⁷ A vessel commits a great wrong, a risk which it has no right to incur, to run in a fog at a high rate of speed when surrounded by or in close proximity to sailing vessels. It is held no excuse for seamen to say that they must make their time and run in the fog. The rule is rigorously enforced and vessels are punished in case of collision in a fog, where the proof shows that the rate of speed was unreasonable under the circumstances.⁴⁸

⁴⁵ *M. J. Cummings, The*, 18 Fed. 178; *Syracuse, The*, 18 Fed. 828, 6 Blatchf. (U. S.) 2, 22 Fed. Cas. No. 13717; *Brooklyn, The*, 2 Ben. (U. S.) 547, 4 Fed. Cas. No. 1938; *Deer, The*, 4 Ben. (U. S.) 352, 7 Fed. Cas. No. 3737; *Quickstep, The*, 9 Wall. (U. S.) 665, 670; *Lady Pike, The*, 21 Wall. (U. S.) 1, 96 U. S. 461.

⁴⁶ *Syracuse, The*, 18 Fed. 828.

⁴⁷ *Pennsylvania, The*, 12 Fed. 914; *Nacoochee, The*, 28 Fed. 462; *McCready v. Goldsmith*, 18 How. (U.

S.) 89; *Bolivia, The*, 1 C. C. A. 221, 49 Fed. 169; *Hammonia, The*, 11 Blatchf. (U. S.) 413, 11 Fed. Cas. No. 6007; *City of New York, The*, 15 Fed. 624; *McCabe v. Old Dominion S. S. Co.*, 31 Fed. 234; *Otter, The*, 4 Ad. & El. 203; *Pennsylvania, The*, 23 L. T. N. S. 55; valuable notes collecting many cases on this subject are found in, 28 C. C. A. 532, and, 29 C. C. A. 368.

⁴⁸ *Manistee, The*, 7 Biss. (U. S.) 35, 16 Fed. Cas. No. 9028; *Leland*,

§ 3387. Collision in fog—Burden of proof and prima facie case. The rule as to burden of proof, or prima facie liability in case of collision by reason of excessive speed, is that proof of a violation of the laws of navigation in this regard is sufficient to cast upon the vessel thus violating the burden of proving that damage did not result from such violation.⁴⁹ Where the proof shows that a vessel was proceeding at full speed in a fog the burden is then upon such vessel to show a legal excuse for such rate of speed. The only legal excuse is "the existence of an immediate danger, and a necessity to go at full speed in order to avoid it." But the mere belief that full speed will avoid a danger which may arise in the future is not such legal excuse.⁵⁰

§ 3388. Rule as to moderate rate of speed.—The statutory as well as the maritime rule is that in case of a fog vessels must proceed at moderate speed. The apparent indefiniteness of this rule does not render it unreasonable. It is intended to be and is a practical one for the guidance of practical men. This term "moderate speed" has received a construction by the courts that makes it both plain and reasonable, and shows that its application depends on all the circumstances under which vessels are placed. One district court said of it: "In the very numerous cases which have arisen in this country and in England with regard to the meaning of this term it has been uniformly held that it admits of no precise definition. What under some circumstances would be a moderate speed would under others be considered excessive. Mr. Justice Lowell observes that the decisions only prove that there is scarcely any rate of speed that has not been held to be too great upon some state of facts. The general rule seems to be that steamers, in a fog, must go at such a rate of speed as will enable them to avoid a collision by slowing, stopping, or reversing, within the distance at which, under the particular circumstances of each case, an approaching vessel can be discovered."⁵¹

The, 19 Fed. 771; *Clare v. Providence &c. Co.*, 20 Fed. 535; *Rhode Island, The*, 17 Fed. 554.

⁴⁹ *Leland, The*, 19 Fed. 771.

⁵⁰ *Iberia, The*, 40 Fed. 893; *City of New York, The*, 35 Fed. 604; *Kirby Hall, The*, L. R. 8 Prob. D. 71

⁵¹ *City of Panama, The*, 5 Sawy. (U. S.) 63, 5 Fed. Cas. No. 2764;

Blackstone, The, 1 Low. (U. S.) 485, 3 Fed. Cas. No. 1473; *Monticello, The*, 1 Holmes (U. S.) 7, 7 Fed. Cas. No. 3971; *Oregon, The*, 27 Fed. 751; *H. F. Dimock, The*, 23 C. A. 123, 77 Fed. 226; see cases collected in, notes, 28 C. C. A. 532, 29 C. C. A. 368, 5 Fed. Cas. No. 787.

Another court said of this moderate speed: "‘A moderate speed’ is a term used in the statute not capable of any definition which would apply it to a speed of any given number of miles an hour alike under all circumstances. What would be moderate speed in the open sea would not be allowable in a crowded thoroughfare or a narrow channel. And under the same circumstances, in other respects, the speed should be the more moderate according as the fog is more dense. The only rule to be extracted from the statute and a comparison of the decided cases is, that the duty of going at a moderate speed in a fog requires a speed sufficiently moderate to enable the steamer under ordinary circumstances, seasonably, usefully, and effectually to do the other things required of her in the same clause of the statute; viz., to slacken her speed, or, if necessary, to stop and reverse."⁵³

§ 3389. Moderate speed—Criterion and burden.—As to the criterion of this moderate speed, Judge Blodgett said: "The rule, as intimated in the authorities I have cited, would indicate that the standard or criterion of speed at which a steamer can safely proceed in a dense fog, upon a highway of commerce like this, and when the peril of collision is ever present, is only such speed as will enable her to stop, so as to avoid a collision after she sights or hears the signals of a sail vessel crossing her path."⁵³ It has been held that by moderate speed is meant less than usual speed.⁵⁴ A vessel colliding with another in a fog in order to escape liability must show to the satisfaction of the court that she was within these rules governing the rate of speed.⁵⁵

§ 3390. Proof of speed not conclusive evidence of negligence. Where the proof shows that a steamer was running at full speed in

⁵³ *Monticello, The*, 1 Holmes (U. S.) 7, 7 Fed. Cas. No. 3971.

⁵⁴ *Leland, The*, 19 Fed. 771.

⁵⁵ *Clare v. Providence &c. Co.*, 20 Fed. 535; *State of Alabama, The*, 17 Fed. 847.

⁵⁶ *Western Metropolis, The*, 7 Blatchf. (U. S.) 214, 29 Fed. Cas. No. 17441; *D. S. Gregory, The*, 2 Ben. (U. S.) 166, 7 Fed. Cas. No. 4099; *Louisiana, The*, 2 Ben. (U. S.) 371, 15 Fed. Cas. No. 8537; *Colorado, The*, 91 U. S. 692; *Alberta,*

The, 23 Fed. 807; *Pennsylvania, The*, 12 Fed. 914; *Nacoochee, The*, 28 Fed. 462; *A. Rossiter, The*, 1 Newb. Adm. (U. S.) 225, 6 McLean 63, 29 Fed. Cas. No. 17147; *Eleanor, The*, 17 Blatchf. (U. S.) 88, 8 Fed. Cas. No. 4335; *City of New York, The*, 15 Fed. 624; *H. F. Dimock, The*, 23 C. C. A. 123, 77 Fed. 226; *Batavier, The*, 9 Moo. P. C. 286, 40 Eng. Law & Eq. 19, 25; *Magna Charta, The*, 25 L. T. N. S. 512.

a fog a few minutes before a collision, it is not sufficient to establish negligence on the part of the steamer where the proof further shows that at the time of the collision she was running dead slow.⁵⁶ So it has been held that the fact of the collision may be conclusive evidence of speed on the part of one vessel or the other, but it is not conclusive evidence of speed on the part of the steamship where the collision is between such steamship and a schooner.⁵⁷

§ 3391. Mutual negligence.—The admiralty courts apply their equitable procedure and principles in cases of collisions occurring from the negligence of both parties. These courts have adopted and constantly apply the principle of comparative negligence in their effort to do equal and exact justice to both parties. Where the proof shows that both parties are negligent in an equal degree the admiralty court grants no relief but leaves the parties in the position it finds them. But where it is made to appear that both vessels have been guilty of negligence, but in an unequal degree, it is the rule in these courts that the loss will not be cast wholly upon the one. The admiralty law wisely provides for a division of damages in three classes of cases: (1) Where on the evidence the fault is inscrutable; (2) where the evidence shows that neither party was in fault; (3) where the evidence shows that both parties were guilty of negligence, but in an unequal degree.⁵⁸

§ 3392. Contributory negligence does not prevent recovery.—The common law rules of contributory negligence find no place in admiralty courts. The libellant is in no way required to prove his freedom from fault. The rule in maritime law is that contributory negligence on the part of the libellant will not prevent a recovery. As the law of negligence is administered in these courts a libellant is entitled to recover when he proves that the negligence of his adversary exceeded in degree that of his own.⁵⁹ The rule has been established in some district courts that running boats in a fog is not negligence per se, but that in the absence of proof of negligence on the part of either vessel in case of a collision a court of admiralty

⁵⁶ *Ludvig Hölberg, The*, 157 U. S. 60, 15 Sup. Ct. 477. *Scioto, The*, 2 Ware (U. S.) 360, 21 Fed. Cas. No. 12508; *Catharine v.*

⁵⁷ *Ludvig Holberg, The*, 157 U. S. 60, 15 Sup. Ct. 477. *Dickinson*, 17 How. (U. S.) 170.

⁵⁸ *David Dows, The*, 16 Fed. 154;

⁵⁹ *David Dows, The*, 16 Fed. 154; *Mabel Comeaux, The*, 24 Fed. 490.

will not apportion the damages.⁶⁰ Proof of violation of the statute or of any maritime law becomes material when such violation prevents a vessel from being seen in time, or when it causes unreasonable obstruction or embarrassment in the performance of the respective duties of the vessel, where in any other way it actively contributes to the collision.⁶¹

§ 3393. Contributory negligence does not prevent recovery—Exceptions.—The rule in maritime law that proof of contributory negligence will not defeat a recovery is not without its exception. The exception to this rule is thus stated: “If the plaintiff so far contributed to the injury complained of by his own negligence or want of ordinary care and caution as that, but for that negligence and want of care and caution on his part, the injury would not have happened, then he is not entitled to recover.”⁶²

§ 3394. What damages recoverable.—The rule, as previously shown, is that where both vessels are in fault the damages are to be divided. Under this rule the damages subject to such division are not necessarily limited to the actual costs of repairs. The rule as to the damages intended to be included is stated thus by one court: “It is sometimes said that the damage done to both ships is to be added together and the sum thereof equally divided. But this language is never used in such connection as to lead to the inference that nothing but the actual cost of repairs is to be taken into account. By the word ‘loss’ or ‘damages’ I understand the Supreme Court to mean the injury directly and necessarily resulting from the collision. If a vessel be bound upon a voyage, and is, by reason of a collision, detained, the loss from detention is a part of the damages resulting from the collision; and if she is disabled by such collision, so that repairs are necessary, the actual cost of such repairs is likewise part of the damages. And in either case such loss or damage is

⁶⁰ Joseph W. Gould, *The*, 19 Fed. 785; Sylph, *The*, 4 Blatchf. (U. S.) 24, 23 Fed. Cas. No. 13711.

⁶¹ Favorita, *The*, 1 Ben. (U. S.) 30, 8 Fed. Cas. No. 4693; Yourri, *The*, L. R. 10 App. Cas. 276; Maryland, *The*, 19 Fed. 551; Sam Rotan, *The*, 20 Fed. 333; Doris Eckhoff, *The*, 32 Fed. 555.

⁶² Sunney v. Holt, 15 Fed. 880; Carl, *The*, 18 Fed. 655; Explorer, *The*, 20 Fed. 135; Wanderer, *The*, 20 Fed. 140; E. B. Ward, Jr., *The*, 20 Fed. 702.

⁶³ Memphis &c. Co. v. H. C. Yeager &c. Co., 10 Fed. 395; Mary Patten, *The*, 2 Low. (U. S.) 196, 16 Fed. Cas. No. 9223.

to be paid by the party solely in fault, if the fault be all on one side, or to be divided if the fault be mutual."⁶³

§ 3395. **Proof of usage.**—The rules of navigation are not entirely statutory. The statutory requirements are largely confirmatory of the rules of usages sometimes called law of the sea, which existed long before there was any legislation upon the subject and which were adopted by both law and admiralty courts, and were used in determining alleged questions of fault and negligence in navigation. In the absence of positive statutes these usages are still adhered to by the courts and on disputed questions of navigation not determined by statute or by the rules of court regulating the practice in admiralty, it has been held that expert evidence is admissible to show a general usage regulating the particular matter.⁶⁴ This principle was stated by the United States Supreme Court as follows: "Sailing rules and other regulations have since been enacted; and it is everywhere admitted that such rules and regulations, in cases where they apply, furnish the paramount rule of decision; but it is well known that questions often arise in such litigations, outside of the scope and operation of the legislative enactments. Safe guides, in such cases, are often found in the decisions of the courts, or in the views of standard text-writers; but it is competent for the court, in such a case, to admit evidence of usage; and, if it be proved that the matter is regulated by a general usage, such evidence may furnish a safe guide as the proper rule of decision."⁶⁵ So, where a vessel fails to follow this usage and a collision or accident results the burden of proof is upon the failing vessel to show a different state of circumstances requiring the other vessel to depart from such usage and go to the left.⁶⁶ In a very recent case, evidence of the practice and custom at the place of collision seems not only to have been admitted but was also held to justify or excuse the passage of tugs and tows on the starboard side instead of the port side as the statutory navigation laws require in ordinary cases. The court held that as the practice of going to the left instead of to the right in passing under the bridge where the collision occurred had existed ever since the bridge was built and was

⁶³ *City of Washington, The*, 92 (U. S.) 276, 29 Fed. Cas. No. 17220; U. S. 31. *St. John v. Paine*, 10 How. (U. S.)

⁶⁴ *City of Washington, The*, 92 U. S. 557, 582; *America, The*, 92 U. S. 432; *A. Demerest, The*, 25 Fed. 921. S. 31.

⁶⁵ *Washington, The*, 3 Blatchf.

apparently justified by the necessities of the bridge navigation, there could be no recovery where the tug and tow in question, although going on the left instead of the right, blown against another by a sudden and unexpected storm, to the great injury of the latter tow.⁶⁷

⁶⁷ *Cornell, The*, 134 Fed. 694. This decision also supports the rule that there can be no recovery where the loss is occasioned by vis major.

EVIDENCE IN COURTS-MARTIAL

CHAPTER CLXVIII.

ORIGIN AND HISTORY.

Sec.	Sec. .
3396. Ancients—Generally.	3398. History of courts-martial in
3397. History of courts-martial in	the United States.
England.	3399. Military law.
	3400. Martial law.

§ 3396. **Ancients—Generally.**—A tribunal in some form has existed from the earliest history of armies whose functions it was to enforce discipline and punish offenders. In the Roman army the magistracy militum and the legionary tribunes, either as sole judges or with the assistance of councils sat as military tribunals. The early Germans in time of war tried their military offender by the Duke or military chief, but he usually delegated his jurisdiction to the priests accompanying the army. Courts of regiments held either by the colonel or by an officer invested by him with the staff or mace called the regiment arose in later times. The king reserved the power to convene the courts composed of bishops and nobles for the trial of high commanders. But courts administering military codes were not instituted until in comparatively modern times.¹ Military jurisdiction in France was originally invested in the Mayor of the Palace, the Grand Seneschal, the constable, and the Provost-Marshal. Courts-martial appear to have been first established in the year 1655.² Among the Saxons or the Anglo-Normans the hearing was before a jury of the Peers of the accused or his military associates upon specific charges; he was permitted to defend and the proof was made by witnesses produced and examined. The courts-martial of the later periods adopted and followed the main features of these courts of the Anglo-Saxons.³

¹ Adams Roman Ant. 330; Bruce's Institutes 295, et seq.; Von Molitor Kriegsgerichte und militärstrafen 11; Koopmann Militärstrafgesetzbuch; Ayala de Judiciis Militaribus.

² Le Faure 141; Foucher Code de la Justice Militaire 3.

³ Von Molitor, § 1, par. 8; 1 Winthrop Mil. Law & Prec. 4, 47.

§ 3397, **History of courts-martial in England.**—Col. Winthrop says in substance that the modern court-martial in England had its origin in the “King’s Court of Chivalry,” or “Court of the High Constable and Marshal of England.” This court was also called “Court of Arms,” or “Court of Honor;” the judges of this court were the Lord High Constable and Earl Marshal. Originally this court had both civil and criminal jurisdiction; it took cognizance of “all matters touching honor and arms,” “pleas of life and member arising in matters of arms and deeds of war,” “the rights of prisoners taken in war” and also of “the offenses and miscarriages of soldiers contrary to the laws and rules of the army;” it exercised jurisdiction in cases of civil crimes and on questions of contract. But this court of Chivalry was subsequently much limited in its power and finally upon the attainder of the High Constable in the thirteenth year of Henry the Eighth fell into disuse and while never abolished by specific statute, it had practically ceased to exist as a military tribunal before the time of the English Revolution. In later years the administration of justice in the military forces was by courts or councils held under what was known as the ordinance or articles. There were usually orders or proclamations directly from the King issued for the government of the army when about to proceed upon an expedition or from time to time during war; “these were succeeded by more extended precepts which continued to be put forth by the Crown, or by its authority, to the period of the rebellion. These articles and the Code promulgated by Gustavus Adolphus were superseded by what has been known as the ‘Mutiny Act.’ This Act and subsequent renewals were continued in force until 1879 when it was succeeded by a new law entitled the ‘Army Discipline and Regulation Act.’ By this the sovereign was authorized to make articles of war and rules of procedure for courts-martial, and from this we have the present English courts-martial.”⁴

§ 3398. **History of courts-martial in the United States.**—On the origin and history generally of courts-martial in the United States Col. Winthrop says: “The English military tribunal, transplanted

⁴1 Winthrop Military Law & Davis Mil. L. 13; 1 Hallam Const. Prec. 6, 49; 2 Grose Hist. Eng. Hist. 325, 531; 8 Opinions Attorney-Army 58, 70; Clode Martial Law General 365; Chambers v. Jennings, 9-11, 83, 158; Hale History of Common Law 42; Hawk P. C., Book 2, Ch. 4; 3 Bl. 68; 2 McArthur 20; 7 Mod. 125, 2 Salk. 553; Grant v. Gould, 2 H. Bl. 69, 84; People v. Van Allen, 55 N. Y. 31.

to this country prior to our Revolution, was recognized and adopted by the Continental Congress, in the first American Articles of War of 1775, where the different courts-martial—General, Regimental and detachment or Garrison courts—were distinguished, and their composition and jurisdiction defined. These provisions were modified and enlarged in the succeeding Articles of 1776 and 1786, and in the latter the authority to order general courts was more precisely indicated. Coming to the period of the Constitution—that instrument, while expressly empowering Congress to provide for the government of the army, and thus to institute courts-martial, also recognized—in the Fifth Amendment—the distinction between civil offenses and those cognizable by a military forum. But, in legislating in view of these provisions, Congress did not originally create the courts-martial, but, by the operation of the Act of September 29, 1789, continued it in existence as previously established. Thus, as already indicated, this court is perceived to be in fact older than the Constitution, and therefore older than any court of the United States instituted or authorized by that instrument. The revised code of articles of war soon after enacted, viz., by the Act of April 10, 1806, repeated the provisions of 1786 in regard to courts-martial, with some slight modifications, consisting mainly in extending the authority to convene general courts and in substituting the President for Congress in the cases in which the latter had previously been vested with final revisory authority. These earlier codes, as also the later articles, have been considered in Chapter II, and are set forth in the Appendix. Between 1806 and 1874, a fourth courts-martial—The Field-Officer's Court, authorized, however, only in time of war—was added to those previously established; the authority to order general courts was still further extended, and their jurisdiction and powers were enlarged. The legislation by which these changes were introduced has been heretofore indicated as embraced in the code of articles contained in the Revised Statutes of June 22, 1874. The subsequent amendments to these articles and other enactments affecting the same—including that of October 1, 1890, adding the Summary Court to the list of military tribunals—have already been specified. The Articles of 1874, with these later provisions, comprise the existing statute law in regard to the constitution, composition, jurisdiction, powers and procedure of American courts-martial. The regulations and usages relating to their forms and practice have been referred to in previous chapters.”⁵

⁵ Winthrop Military Law & Prec. 50; Reed, *Ex parte*, 100 U. S. 13;

§ 3399. **Military law.**—Military law is mainly the creature of statutes and is enacted for the purpose of furnishing rules for the government and discipline of the army and navy,⁶ regardless of an actual state of war. Its jurisdiction and application extend usually only to those who are a part of the army, and is limited almost exclusively to breaches of military duty. The statute explicitly defines the breaches of military duty, especially those which are highly penal, over which the military law exercises its jurisdiction. It does, however, extend to all cases that can strictly or properly be called neglect of duty or discipline.⁷ It takes cognizance only of matters that are criminal or quasi-criminal. This subject has been more particularly defined thus: “Military law is that portion of the law of the land designed for the government of a particular class of persons, and administered by special tribunals. It is superinduced to the ordinary law for the purpose of regulating the citizen in his character of soldier; and although military offenses are not cognizable under the common-law jurisdiction of the United States, yet the articles of war clearly recognize the superiority of the civil over the military authorities.”⁸

§ 3400. **Martial law.**—There is a clear distinction between martial law and what is sometimes particularly denominated military law. The distinction rests chiefly in the difference in jurisdiction, yet it enters also into the rules of practice and the admission of evidence. While to a certain extent martial law may include what has been termed military law, it extends also to a great variety of subjects with which military law can have nothing to do. Martial law usually exists in case of actual war and is proclaimed by the military chief and is founded on what is sometimes termed paramount necessity. When imposed upon a country or city all the inhabitants, civil and military are included within its terms. The Duke of Wellington

Mason, *Ex parte*, 105 U. S. 696; Milligan, *Ex parte*, 4 Wall. (U. S.) 2, 123; Bogart, *In re*, 2 Sawy. (U. S.) 396; *People v. Daniell*, 6 Lans. (N. Y.) 44; *Rawson v. Brown*, 18 Me. 216; *United States v. Mackenzie*, 1 N. Y. Leg. Obs. 371, 30 Fed. Cas. 18313; 2 American Archives 1855; 15 Opinion Attorney-General 152.

⁶ *United States v. Dunn*, 120 U. S. 252, 7 Sup. Ct. 507.

⁷ *Grant v. Gould*, 2 H. Bl. 69, 73, 100; *Wolton v. Gavin*, 15 Jur. 329, 16 Q. B. 48; *Smith v. Shaw*, 12 Johns. (N. Y.) 257; *Mills v. Martin*, 19 Johns. (N. Y.) 7, 20; *Johnson v. Jones*, 44 Ill. 142, 92 Am. Dec. 159.

⁸ Benet Military Law & Court-Martial 7; De Harte Military Law 16; Winthrop Military Law & Prec. 1, 4; Greenleaf Ev., §§ 468, 469.

said "that martial law was neither more nor less than the will of the general who commands the army; in fact, martial law is no law at all." And Earl Grey said on the same occasion, "that what is called proclaiming martial law is no law at all but merely for the sake of public safety, in circumstances of great emergency, setting aside all law, and acting under the military power."⁹ One writer thus defines it: "The scope of martial law is rather danger than actual outbreak; it is prevention rather than resistance; it is anticipation of apprehended insurrection; it is the mode of dealing with a state of rebellion rather than its mere actual outbreak, although that state may be declared by some outward acts and outrages."¹⁰

⁹ Duke of Wellington's Speech in House of Lords, April 1, 1851; Finlason *Martial Law*, Preface VII; 1 Winthrop *Military Law & Prec.* 1274, et seq.; De Harte *Military Law* 17; Maltby *Courts-Martial* 3, et seq.; Milligan, *Ex parte*, 4 Wall. (U. S.) 2, 127; Egan, *In re*, 5 Blatchf. (U. S.) 319, 8 Fed. Cas. No. 4303.

¹⁰ Finlason *Martial Law* 27; 3 Greenleaf, §§ 468, 469; Benet *Military Law & Court-Martial* 10-14; Grant v. Gould, 2 H. Bl. 69, 98; Luther v. Borden, 7 How. (U. S.) 1, 59; Griffin v. Wilcox, 21 Ind. 370, 377; Kemp, *In re*, 16 Wis. 359, 368. See generally note 92 Am. Dec. 180.

CHAPTER CLXIX.

NATURE AND ORGANIZATION.

Sec.	Sec.
3401. Court-martial is a court.	3409. Judge advocate — Appoint-
3402. General courts-martial — Or-	ment.
ganization, etc.	3410. Judge advocate—Who may be
3403. Regimental or corps court-	appointed.
martial.	3411. Judge advocate—Powers.
3404. Number composing court.	3412. Judge advocate—Duties to the
3405. Garrison court-martial.	court.
3406. Summary courts-martial.	3413. Judge advocate—Duties to the
3407. Presiding officer.	accused.
3408. Presiding officer—Functions.	3414. Members—Qualifying.

§ 3401. **Court-martial is a court.**—A court-martial is recognized by almost all authorities and law writers as a court or judicial tribunal with the essential functions of such. It decides upon its jurisdiction, entertains charges, hears evidence, passes sentence, and in some form directly or indirectly executes its judgments. On the nature of this tribunal the Court of Appeals of New York says: "Courts-martial were instituted for the trial of naval and military offenses, and existed as early as the reign of James II, and probably had their origin in the ancient Court of Chivalry. They are regarded as a necessity in every civilized government, in order to properly discipline the military forces, by punishing offenses therein. The tribunal is recognized as a court in the elementary works. Bouvier defines it as 'a military or naval tribunal, which has jurisdiction of offenses against the law of the service, military or naval, in which the offenders is engaged.' Greenleaf says: 'A court-martial is a court of limited and special jurisdiction.' It has all the elements of a court. It has judges to hear the evidence, and determine the facts, and apply the law. It has parties, prosecutor and defendant. It has pleadings and a formal trial, renders judgment and issues process to enforce it. In short, it does everything within the sphere of its jurisdiction which any judicial tribunal can do to administer justice."¹ But it has been held that a court-martial is not a court of record.²

¹ *People v. Van Allen*, 55 N. Y. 31; S.) 193; *Wilson v. John*, 2 Binn. 3 Greenleaf Ev., § 470. (Pa.) 209.

² *Watkins*, Ex parte, 3 Pet. (U.

§ 3402. **General courts-martial — Organization, etc.** — General courts-martial when necessary may be appointed by any general officer commanding an army, a territorial division or a department, or colonel commanding a separate department. When any such commander or officer is the prosecuting witness against any officer under his immediate command the court shall be appointed by the President. The commander of a division, or of a separate brigade of troops, shall have power to appoint a general court-martial in time of war. But if such commander is the prosecuting witness in case of a charge against any person under his command such court shall be appointed by the next higher in command. The President of the United States as Commander-in-Chief of the Army has the right by virtue of his office to appoint a general court-martial.³

§ 3403. **Regimental or corps court-martial.**—The army regulations also provide that an officer commanding a regiment or a corps shall have authority to appoint courts-martial for his own regiment or corps. Such court shall consist of three officers, and it shall have jurisdiction to try all offenses committed by persons connected with such regiment or corps except capital cases.⁴ Under the provisions of this section it has been held that the Chief of Engineers was authorized to order a court-martial for the trial of soldiers of the Engineer Battalion, and that such battalion, in connection with the engineer officers of the army, are deemed to constitute a corps within the sense of this article. So, it was held that the Chief of Ordnance under this article was authorized to order a court for the trial of men enlisted by him, this being such a separate and distinct branch of the military as to come within the meaning and designation of corps. And for similar reasons it was held that the chief signal officer was authorized to convene courts-martial.⁵

§ 3404. **Number composing court.**—By the statutory provision general courts-martial may consist of any number of officers from five to thirteen, inclusive; but it must consist of not less than thirteen when this number can be used as a court without injury to the service.⁶ When the number required to form a general court-martial is not present at any military post or detachment the commanding of-

³ Runkle v. United States, 19 Ct. Cl. (U. S.) 396; Swalm v. United States, 28 Ct. Cl. (U. S.) 173.

⁴ Article 81.

⁵ McClure Dig. of Opinions 70, § 212.

⁶ Article 75. McClure Dig. Opinions 67.

ficer shall report to the commanding officer of the department and he shall thereupon convene a court-martial at the nearest post or department where there may be the required number of officers, and shall order the accused and witnesses to be taken to the place where the court is assembled.⁷ The provision that not more than one-half of the court, exclusive of the President, shall be junior in rank to the accused officer, when it can be avoided without injury to the service, is within the discretion of the officer convening the court; and in the absence of a showing to the contrary it will be presumed that the discretion was properly exercised, and the fact that on a previous occasion superior officers were sent to make up the court-martial cannot affect the legality of the court.⁸

§ 3405. **Garrison court-martial.**—"Every officer commanding a garrison, fort, or other place, where the troops consist of different corps, shall be competent to appoint, for such garrison or other place, courts-martial, consisting of three officers, to try offenses not capital."⁹ The term "other place" used in this article has been held to be intended to include any place, situation or locality such as post, station, camp or halting place at which there may be a separate command or detachment in which different corps of the army are represented. And if there are sufficient officers, other than the commanding officer, in the command so situated, then such commander is authorized under this article to convene a court-martial. The officer commanding in such case is not required to be of the rank of field officer; a captain or even a lieutenant who is the officer commanding is duly authorized under this article to convene the court, but he cannot detail himself with two others.¹⁰ The jurisdiction of these regimental and garrison courts-martial has been limited. The section of the statute limiting this jurisdiction reads as follows: "Regimental and garrison courts-martial and summary courts detailed under existing laws to try enlisted men shall not have power to try capital cases or commissioned officers, but shall have power to award punishment not to exceed confinement at hard labor for three months or forfeiture of three months' pay, or both, and in addition thereto, in the case of non-commissioned officers reduction to the ranks and in the case of first-class privates reduction to second-class pri-

⁷ Article 76.

Sup. Ct. 448; McClure Dig. Opinions, § 206.

⁸ Mullan v. United States, 140 U. S. 240, 11 Sup. Ct. 788; Swalm v. United States, 165 U. S. 553, 17

⁹ Article 82.

¹⁰ McClure Dig. Opinions 71.

vates: Provided, That a summary court shall not adjudge confinement and forfeiture in excess of a period of one month, unless the accused shall before trial consent in writing to trial by said court, but in any case of refusal to so consent, the trial may be had either by general, regimental or garrison court-martial, or by said summary court, but in case of trial by said summary court without consent as aforesaid, the court shall not adjudge confinement or forfeiture of pay for more than one month.”¹¹

§ 3406. Summary court-martial.—The power of an officer commanding a garrison, fort or other place has undergone some changes by which such officer is now authorized to appoint what is called a summary court for the place or command, or in his discretion for each battalion thereof. This summary court is to consist of one officer to be designated by such commander who shall have jurisdiction to try offenses committed by the enlisted men of such command, where such offense is not capital, and except when the accused is to be tried by general court-martial. No sentence adjudged by such summary court shall be executed until it shall have been approved by the officer appointing the court, or by the officer commanding for the time being, except, however, that when there is but one commissioned officer present with a command he shall hear and finally determine such case. This summary court has no jurisdiction over a soldier holding a certificate of eligibility to promotion; nor as to non-commissioned officers over their objection without the authority of the officer competent to order their trial by general court-martial. Such cases shall be tried before the garrison, regimental or general courts-martial.¹²

§ 3407. Presiding officer.—In the organization of British courts-martial a president is appointed who is a distinct official from the other members. In the earlier practice in this country one officer was generally especially detailed as president or presiding officer. But under the practice in recent years the president is not appointed as such but is simply the senior in rank and presides by virtue of this seniority. No special rank or qualifications are required for the position of presiding officer of a court-martial. When the court convenes, if the senior officer appointed is absent, or in the case of his

¹¹ Act March 2, 1901.

piled Stat. 961; McClure Dig. Opin-

¹² Act June 18, 1898; 1 U. S. Com- ions, § 675.

subsequent absence for any cause, in either event the officer next in rank succeeds to the position of president of the court.¹³

§ 3408. Presiding officer—Functions.—The presiding officer has practically no statutory duties aside from his duties as a member. It is his duty to keep order and conduct the business of the court. It is his place to speak for the court where any rule of action has been prescribed either by law, regulations, orders or by the resolution of the court itself. It is his statutory duty to administer the proper oath to the judge-advocate.¹⁴ It is also his duty to convene and adjourn the court on a vote of the majority or at the hour required by the articles of war. Generally speaking he performs the functions and duties of the chairman of an ordinary public meeting, or of the chairman of a committee appointed by a duly organized body whose functions are not otherwise specifically defined. He is not authorized to make any ruling on the admissibility of the evidence, and can only announce such ruling as the decision of the court. He has no power to act independently nor can he make any decision or take any steps contrary to the will of a majority of the court. He has no power to excuse a member from attendance and can only express his views and vote as any other members of the court.¹⁵

§ 3409. Judge-advocate—Appointment.—The judge-advocate is appointed by the officer who appoints the court-martial.¹⁶ This applies to the officers empowered to order regimental, garrison or summary courts-martial as well as to officers authorized to convene general courts-martial.¹⁷ Each general court-martial convened by a competent commander should have appointed a separate judge-advocate. While the same officer may be selected to perform the duties of judge-advocate for different courts-martial, he should be detailed anew for each separate one. An appointment in a general order for a particular officer to act as judge-advocate for all courts that are to be held in a particular command would be irregular.¹⁸ The commander convening the court may relieve a judge-advocate and appoint another; but it is not regarded as good policy to relieve a

¹³ McClure Dig. Opinions, § 2043; 2046; 1 Winthrop Military Law & 1 Winthrop Military Law & Prec. Prec. 249, 250.
248.

¹⁴ Article 74.

¹⁵ Article 85.

¹⁷ McClure Dig. of Opinions.

¹⁸ McClure Dig. Opinions, §§ 2044, § 1520.

¹⁹ McClure Dig. Opinions, § 1520.

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perience. The judge-advocate has power to prepare a case for trial after the charges are transmitted to him by the proper officer for that purpose. He cannot entertain or act upon charges; he may be directed to prepare or to reform the charges already drawn; but he has no authority to modify in any material particulars, in the absence of directions from the convening officer, the formal charges prepared and transmitted. He may correct obvious mistakes or slight errors in names or dates but he is not empowered to make substantial amendments in the allegations nor to reject or withdraw a charge or specification or substitute a new and distinct charge or dismiss or non pros. the proceedings.²⁷

§ 3412. Judge-advocate—Duties to the court.—The prime duty of the judge-advocate is to prosecute in the name of the United States.²⁸ It is usually his duty to serve the charge upon the accused if this has not been done before his appointment, and it is his duty to summon the necessary witnesses for the trial and especially those whose names are appended to the charge; and in order to prevent delay and expedite the trial he is authorized to summon the witnesses both for the prosecution and for the accused, and where depositions are required to be taken, it is his duty in concert with the accused to prepare and forward necessary interrogatories.²⁹ The judge-advocate prepares the complete record required by the army regulations to be kept. The record of each days proceedings should be prepared and submitted to the court at the next day or next session for its approval or correction.³⁰ He should execute the orders of the court and notify the members of the time and place designated by the presiding officer for re-assembling.³¹ He is entitled to make the closing argument to the court, and the fact that the accused makes no argument does not deprive the judge-advocate of his right to address the court as its adviser, and the court itself cannot deny him this right. But he is not authorized to read or present, as a part of his address, any evidence or written statements not introduced upon the trial.³²

§ 3413. Judge-advocate—Duties to accused.—The judge-advocate acts in a sort of dual capacity. While his prime duties are to the

²⁷ McClure Dig. Opinions, §§ 1531–1532.

²⁸ Article 90.

²⁹ 1 Winthrop Military Law & Prec. 277.

³⁰ McClure Dig. Opinions, § 1537.

³¹ McClure Dig. Opinions, § 1538.

³² McClure Dig. Opinions, § 1542.

court yet he has, by virtue of his position, certain duties to perform toward the accused. Thus, when the prisoner has pleaded to the charge the judge-advocate is so far counsel for the prisoner as to object to any leading question to any of the witnesses, and to any question to the prisoner the answer to which might tend to criminate him.³³ When the accused is ignorant and inexperienced and without counsel, it is the duty of the judge-advocate to see that he does not suffer from any ignorance or misconception of his legal rights, and he shall award to him the opportunity for making such a plea and such a defense as will best show the merits of his case as well as present any extenuating circumstances. He should advise the prisoner of his right to testify in his own behalf and of his right, where it exists, to plead the statute of limitations.³⁴ Where the accused has intelligently and voluntarily pleaded guilty the judge-advocate should advise him of his right to offer evidence in explanation or extenuation of the offense and should assist him in securing any such evidence.³⁵

§ 3414. Members—Qualifying.—When the members of the court are finally determined upon, they must, before any steps in the trial are taken, be duly qualified. The judge-advocate administers to each member the following oath: “You, A B, do swear that you will well and truly try and determine, according to the evidence, the matter now before you, between the United States of America and the prisoner to be tried, and that you will duly administer justice, without partiality, favor or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise, not explained by said articles, then, according to your conscience, the best of your understanding, and the custom of war in like cases. And you do further swear that you will not divulge the sentence of the court until it shall be published by the proper authority, except to the judge-advocate, neither will you disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof as a witness, by a court of justice, in a due course of law. So help you God.”³⁶ The oath may be administered to all at the same time, but each member should be named and his rank stated. The members may profitably study the oath with reference to their duties.

³³ Article 90; 3 Greenl. Ev., § 474.

³⁴ McClure Dig. Opinions, § 1534.

³⁵ McClure Dig. Opinions, § 1533.

³⁶ Article 84.

CHAPTER CLXX.

JURISDICTION.

Sec.	Sec.
3415. Generally.	3423. Jurisdiction over civilians—
3416. Jurisdiction—Non-territorial.	Limitations.
3417. Jurisdiction—Criminal.	3424. Presumptions.
3418. Jurisdiction of regimental,	3425. Burden of proof.
garrison or summary courts.	3426. Judgments of courts-martial
3419. Jurisdiction—Acts binding.	not subject to review by
3420. Jurisdiction to determine	civil courts.
whether or not accused is	3427. Judgments of courts-martial
a soldier.	subject to review by civil
3421. Jurisdiction over civilians.	courts.
3422. Jurisdiction over civilians—	
Aiding.	

§ 3415. **Generally.**—The nature of the jurisdiction of courts-martial is stated by Mr. Greenleaf thus: “A court-martial is a court of limited and special jurisdiction. It is called into existence by force of express statute law, for a special purpose, and to perform a particular duty; and when the object of its creation is accomplished, it ceases to exist. The law presumes nothing in its favor. He who seeks to enforce its sentence, or to justify his conduct under them, must set forth affirmatively and clearly all the facts which are necessary to show that it was legally constituted and that the subject was within its jurisdiction. And if, in its proceedings or sentence, it transcends the limit of its jurisdiction, the member of the court, and its officer who executes its sentence, are trespassers, and as such are answerable to the party injured, in damages in the courts of common law.”¹

§ 3416. **Jurisdiction—Non-territorial.**—The jurisdiction of courts-martial is not confined to any particular place. As a matter of neces-

¹ 3 Greenleaf Ev., § 470; Wise S.) 193; Smith v. Shaw, 12 Johns. v. Withers, 3 Cranch (U. S.) 331; (N. Y.) 257; Mills v. Martin, 19 Watkins, Ex parte, 3 Pet. (U. Johns. (N. Y.) 7; Brooks v. Adams,

sity it is as migratory as either the army or navy. The same necessity that calls these courts into existence gives to their jurisdiction this migratory nature. They are necessarily concomitants of the army and navy. "Military jurisdiction does not recognize territoriality as an essential element of military offenses but extends to the same wherever committed." Under this principle it was held that a court-martial properly convened in Texas by the department commander had jurisdiction over an offense committed while the army was in Mexico.³ Under this rule a general court-martial could lawfully be convened at any point or place. But as an act of natural justice it should be convened at a suitable and convenient place where the accused and the witnesses are located or near the place where the offense was committed.³

§ 3417. Jurisdiction—Criminal.—Courts-martial being bodies of exceptional and restricted power can only take cognizance of such offenses as are recognized by the military code as existed under the common-law practice and by virtue of the statute. Their jurisdiction is confined exclusively to criminal cases, and the functions of these courts are to assess penalties for violations of military and naval laws, rules and regulations with the object of maintaining discipline in the army and navy. They have no jurisdiction to entertain actions or to assess damages in cases of contracts or torts or other civil rights. On the nature of the jurisdiction of this court in this respect Col. Winthrop says: "It has in fact no civil jurisdiction whatever; cannot enforce a contract, collect a debt or award damages in favor of an individual. All fines and forfeitures which it decrees accrue to the United States. Even where it tries and convicts an accused for an offense involved in an obligation incurred or injury done to another person, whether a military person or a civilian—as in the case of an officer guilty of dishonorable conduct in the non-payment of private debts, in that a soldier who has stolen from a comrade or trespassed upon a citizen—it cannot adjudge that the debt be paid, that the property be returned, or that its pecuniary value or the amount of

11 Pick. (Mass.) 441; Duffield v. General 55; Hamilton v. McClaughry, 3 S. & R. (Pa.) 590; Hamilton v. McClaughry, 136 Fed. 445; Military Law U. S. 1901, Par. 1797, n. 3, for a full collection of cases.

³ McClure Dig. Opinions, p. 296, § 1041; Winthrop's Dig. Opinions, p. 322; Manual for Court-Martial 1901, p. 14; 4 Opinions of Attorney-
² Winthrop Dig. of Opinions, p. 322.

the damage, be made good to the party aggrieved. Its judgment is a criminal sentence, not a civil verdict; its proper function is to award punishment upon the ascertainment of guilt.”⁴

§ 3418. Jurisdiction of regimental, garrison and summary courts. The jurisdiction of these courts is specifically set forth by statute as follows: “Regimental and garrison courts-martial and summary courts detailed under existing laws to try enlisted men shall not have power to try capital cases or commissioned officers, but shall have power to award punishment not to exceed confinement at hard labor for three months or forfeiture of three months’ pay, or both, and in addition thereto, in the case of non-commissioned officers reduction to the ranks and in the case of first-class privates reduction to second-class privates: Provided, That a summary court shall not adjudge confinement and forfeiture in excess of a period of one month, unless the accused shall before trial consent in writing to trial by said court, but in any case of refusal to so consent, the trial may be had either by general, regimental or garrison court-martial, or by said summary court, but in case of trial by said summary court, without consent as aforesaid, the court shall not adjudge confinement or forfeiture of pay for more than one month.”⁵

§ 3419. Jurisdiction—Acts binding.—Military jurisdiction is affirmed to be of two kinds: (1) That which is conferred and defined by statute; (2) that which is derived from the common law of war. The offenses which are conferred and defined by statute must be tried according to the statutory direction. But those which are not defined by statute are tried and punished under the common law of war. The first jurisdiction is exercised by courts-martial in the armies of the United States and perhaps of Great Britain; cases falling within the second kind of jurisdiction are usually tried by military commissions. These jurisdictions are applicable in war with foreign nations as well as in case of rebellion. When a court, exercising either of these jurisdictions, is duly appointed and regularly convened and its forms of procedure are within the statutory regulations, and the subject matter, as well as the person, is within the jurisdiction conferred, then the judgment or sentence pronounced by such court is binding and relief can only be had through the forms pre-

⁴1 Winthrop Mil. Law & Prec. 63.

⁵1 U. S. Comp. Stat. 1901, Art. 83, p. 963.

whatever the proof should show explicitly and unequivocally that the accused is either a soldier or other person over whom the court has jurisdiction. The necessity for the strict adherence to this principle and the danger of any departure from it was thus stated by an early English case: "It is not disputed that a court-martial has power to try the question, whether soldier or not? That power must be inseparable from their jurisdiction. But they exercise it at their peril; and it behooves them to have the most explicit and unequivocal proof that a man is a soldier, before they venture to put him on his trial for any offense whatever. If it shall be in the power of any military commander to take up a man under pretense of some supposed military offense, and it shall be in the power of a court-martial to give themselves jurisdiction over him, by deciding him to be a soldier, upon evidence such as has been received in the present instance, the liberty of the subject is at an end, and the army may, as soon as its commander shall think fit, become the sovereign power of this country."¹⁰

§ 3421. Jurisdiction over civilians.—Generally speaking, the jurisdiction of courts-martial is confined to enlisted men and officers of the army and navy, and in special statutory cases to militia. But there are instances in which this jurisdiction has been exercised over civilians or persons not enlisted either in the army or navy. But the jurisdiction assumed over persons other than soldiers and sailors is under the principle of the necessity of maintaining discipline in the army. "All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders according to the rules and discipline of war."¹¹ This article during war has been held to apply to teamsters, watchmen, laborers, engineers, ambulance drivers, operators and many

¹⁰ *Grant v. Gould*, 2 H. Bl. 69, 86; *Tyler v. Pomeroy*, 8 Allen (Mass.) 480; *Military Laws U. S. 1901*, Par. 1797, n.

¹¹ Article 63. *Houston v. Moore*, 5 Wheat. (U. S.) 1; *Martin v. Mott*, 12 Wheat. (U. S.) 19; *Reed*, In re, 26 Int. Rev. Rec. 35, 20 Fed. Cas. No. 11636; *Bogart*, In re, 2 Sawy. (U. S.) 396, 3 Fed. Cas. No. 1596; *United States v. Bogart*, 3 Ben. (U. S.) 257, 24 Fed. Cas. No. 14616

Reed, Ex parte, 100 U. S. 13; *Johnson v. Sayre*, 158 U. S. 109, 15 Sup. Ct. 773; *Thomas*, In re, 10 Int. Rev. Rec. 53, 23 Fed. Cas. No. 13888; *Henderson*, Ex parte, 11 Fed. Cas. No. 6349; *Van Vranken*, Ex parte, 47 Fed. 888; *Davison*, In re, 21 Fed. 618; *Craig*, In re, 70 Fed. 969; *Smith v. United States*, 26 Ct. Cl. (U. S.) 143; *Military Laws U. S. 1901*, Par. 1796, n.

The courts will not permit the military authorities to usurp the functions of civil government in localities not in a state of war, and where there is no necessity for martial law or military rule. Such jurisdiction is usually confined to the territory of the actual theater of war, to the place where the civil tribunals are closed and where the civil power is superceded by force. In such place the President of the United States has the right to govern by martial law through his military officers; but in all other places and at all other times such martial law is excluded by the civil. This military jurisdiction cannot be exercised to the extent of the denial of the right of trial by jury in a locality or state where the federal authority is unopposed and where the federal courts are open for the trial of offenses and the redress of grievances.¹⁷

§ 3424. **Presumptions.**—Courts-martial are regarded as of such limited and special jurisdiction and invested powers that the law will raise no presumptions in favor of their legality.¹⁸ But where a decision of a court-martial is attacked or called in question in any other court, there is no presumption of law that such court-martial exceeded its jurisdiction, but such fact must be manifestly shown.¹⁹ Courts-martial belong to that class of courts of inferior and limited jurisdiction that has no presumptions in favor of its jurisdiction; and the party who seeks any advantage of the proceedings must show affirmatively its jurisdiction.²⁰ On the peculiar jurisdiction of courts-martial an early New York case said: "That a court-martial is a court of special and limited jurisdiction must be evident upon the slightest reflection. It is called into existence for special and temporary purposes, and when those purposes are answered, it is dissolved and disappears. That it is limited to particular offenders and offenses, and to those only, is equally certain. All its powers are, therefore, special and limited."²¹

¹⁷ *Milligan, Ex parte*, 4 Wall. (U. S.) 2; *Kemp, In re*, 16 Wis. 359, 382; *Duffield v. Smith*, 3 S. & R. (Pa.) 590; *Shoemaker v. Nesbit*, 2 Rawle (Pa.) 201; *Antrim's Case*, 5 Phila. (Pa.) 278; *Jones v. Seward*, 40 Barb. (N. Y.) 563; *Martin, In re*, 45 Barb. (N. Y.) 142; *Smith v. Shaw*, 12 Johns. (N. Y.) 257; *Mills v. Martin*, 19 Johns. (N. Y.) 7; *Johnson v. Jones*, 44 Ill. 142; *Grif-*

fin v. Wilcox, 21 Ind. 370; *McRoberts, Ex parte*, 16 Iowa 600.

¹⁸ *Brooks v. Daniels*, 22 Pick. (Mass.) 498; *Hamilton v. McClaughry*, 136 Fed. 445.

¹⁹ *Washburn v. Phillips*, 2 Metc. (Mass.) 296.

²⁰ *Barrett v. Crane*, 16 Vt. 246.

²¹ *Mills v. Martin*, 19 Johns. (N. Y.) 7; *Brooks v. Adams*, 11 Pick. (Mass.) 441; *Wright, In re*, 34 How.

alterable by them. If it were otherwise, the civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts."²⁵ In a comparatively recent case the same court said on this subject: "The court-martial having jurisdiction of the person accused and of the offense charged, and having acted within the scope of its lawful powers, its decisions and sentence cannot be reviewed or set aside by the civil courts, by writ or habeas corpus or otherwise."²⁶ The Massachusetts Supreme Court said: "No acts of military officers or tribunals within the scope of their jurisdiction, can be revised, set aside, or punished, civilly or criminally, by a court of common law. And in the same case this court say: "With acts affecting military rank or status only, the offenses against articles of war or military discipline, the civil courts have uniformly declined to interfere."²⁷

§ 3427. Judgments of courts-martial subject to review by civil courts.—There are certain judgments or sentences pronounced by courts-martial over which the civil courts may have control. The class of judgments of such courts which are subject to the control of civil courts is limited to such judgments or sentences that are pronounced where the court was without jurisdiction over the subject matter, or when the punishment inflicted was forbidden by law. In all such cases the party aggrieved may apply to a civil court for redress and relief will be granted where it is made to appear that the

²⁵ *Dynes v. Hoover*, 20 How. (U. S.) 65, 82; *Milligan, Ex parte*, 4 Wall. (U. S.) 2; *Johnson v. Sayre*, 158 U. S. 109, 15 Sup. Ct. 773; *Reed, Ex parte*, 100 U. S. 13; *Mason, Ex parte*, 105 U. S. 696; *Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. 570; *Corbett, In re*, 9 Ben. (U. S.) 274, 277, 6 Fed. Cas. No. 3219; *Barrett v. Hopkins*, 2 McCrary (U. S.) 129; *People v. Hoffman*, 166 N. Y. 462, 473, 60 N. E. 187; *United States v. Mackenzie*, 1 N. Y. Leg. Obs. 371, 30 Fed. Cas. No. 18313; *Perault v. Rand*, 10 Hun (N. Y.) 222; *Barwis v. Keppel*, 2 Wils. 314; *Mansergh, In re*, 1 Best & S. 400, 406; *John-*

stone v. Sutton, 1 Term R. 510, 546; *Leonards v. Shields*, 1 McArt. Court Martial 159, n.; *Bailey v. Warden*, 4 M. & S. 400; *Vallandigham, Ex parte*, 1 Wall. (U. S.) 243; *Reg. v. McCarthy*, 14 W. R. 918; *Poe, In re*, 5 B. & Ad. 681; *Grant v. Gould*, 2 H. Bl. 69; *Mansergh, In re*, 1 Best & S. 400; *De Hart Military Law* 226; 1 *Winthrop Military Law & Prec.* 55, et seq.; *McClure Dig. of Opinions* 283, and notes; *Dig. Opin. J. A. G.*, Par. 1024.

²⁶ *Johnson v. Sayre*, 158 U. S. 109, 15 Sup. Ct. 773.

²⁷ *Tyler v. Pomeroy*, 8 Allen (Mass.) 480.

CHAPTER CLXXI.

MATTERS OF PRACTICE.

Sec.	Sec.
3428. Arrest.	3432. Privilege of counsel.
3429. Close and open arrest.	3433. Status and privilege of counsel.
3430. Report of arrest and notice of charge.	3434. Right of challenge.
3431. Right of accused to have counsel.	3435. Commander as prosecutor.
	3436. Commander not prosecutor.

§ 3428. **Arrest.**—The court-martial has nothing whatever to do with the arrest; it formulates no charge, returns no indictment, issues no warrant. The arrest is made by or at the instance of officers before the court is organized, and by those who may have nothing whatever to do with the organization of the court or the subsequent trial. A military arrest is usually made either by a verbal or written order. The written order is more preferable and is usually the method adopted, except where the offense is committed in the presence of a commanding officer and he orders the immediate arrest of the offender. The articles provide that officers charged with crime shall be arrested and confined in their barracks, quarters or tents, and that soldiers charged with crimes shall be confined until tried by court-martial, or released by proper authority.¹ The confinement contemplated in this article does not imply either a distinction by force or confinement by imprisonment except, perhaps, in extreme cases. When the arrested officer properly conducts himself the restraint should not be so severe as to prevent the proper preparation of his defense. An arrested officer is to be confined to his barracks, quarters or tent, that is, his own military habitation or lodgings, and he cannot ordinarily be removed from these and confined in quarters or tents distant from his own.²

§ 3429. **Close and open arrest.**—Military authorities do not construe the provision for confinement in Article 65 as mandatory. No

¹ Articles 65, 66, 70.

² Winthrop Military Law & Prec.
153.

tolerated as a friend of the accused, but it was left optional with such a court to so tolerate the counsel. But it was held by the court of appeals that this provision in military regulations was in conflict with the state constitution which provided that the accused shall be allowed to appear and defend in person and with counsel "in any trial in any court whatever."⁷ This rule is now practically universally followed in all court-martial proceedings.⁸ Some writers still maintain that the admission of counsel on behalf of the accused is a privilege and not a right. But they admit that the privilege is almost invariably accorded and granted as a matter of course.⁹

§ 3432. Privilege of counsel.—Under the earlier and stricter rules the prisoner's counsel was little more than an *amicus curiae*. He was seated near the prisoner and wrote the questions intended to be asked upon slips of paper and handed these to the prisoner, which were in turn passed to the judge-advocate. He was never allowed to address the court, and any remarks or arguments must be presented in writing.¹⁰

§ 3433. Status and privileges of counsel.—But a better and more liberal rule has gradually been introduced into the practice, and it is generally recognized now that counsel have about the same standing and recognition in courts-martial as in other courts. The modern rule as to the status of counsel is stated as follows: "But the more recent radical reconstruction of the British military law has done away with the previous usage in this regard; and in the rules of procedure it is declared that the counsel both of the prisoner and of the prosecutor at a military trial shall have the same right as the party for whom he appears to call and orally examine and cross-examine witnesses, as well as to make objections and statements, put in pleas, and address the court. As to the practice before courts-

⁷ *People v. Van Allen*, 55 N. Y. 31; *People v. Hoffman*, 166 N. Y. 475, 60 N. E. 187; 14 Green Bag 99;

⁸ *Winthrop Military Law & Prec.* 1274, et seq.; *Benet Military Law & Court Martial* 65; *De Hart Military Law* 132-134; *Dig. Opin. J. A. G.*, Pars. 984, 985, 987.

⁹ *Barron v. Mayor of Baltimore*, 7 Pet. (U. S.) 243; *Watkins, Ex parte*, 7 Pet. (U. S.) 568, 573;

Twitchell v. Commonwealth, 7 Wall. (U. S.) 321, 326; *Edwards v. Elliott*, 21 Wall. (U. S.) 532, 557; *Walker v. Sauvinet* 92 U. S. 90; *Pearson v. Yewdall*, 95 U. S. 294; 1 *Winthrop Military Law & Prec.* 241.

¹⁰ *De Hart Military Law*, p. 132; 1 *Winthrop Military Law & Prec.* 242; *Benet Military Law & Court-Martial* 65.

§ 3435. Commander as prosecutor.—The rule for determining when such commander is the accuser or prosecutor is thus stated: "On the other hand, where he himself initiates the charge, out of a hostile animus toward the accused or a personal interest adverse to him, or from a similar motive adopts and makes his own a charge initiated by another, he is to be deemed an 'accuser or prosecutor' within the article. Nor is he the less so where, though he has no personal feeling or interest in the case, he has become possessed with the conviction that the accused is guilty and deserves punishment, and in this conviction initiates or assumes as his own the charge or the prosecution. For in this case equally as in the former he is unfit to be a judge upon the merits of the case; in the one instance he is too much prejudiced to be qualified to do justice; in the other he has condemned the accused beforehand."¹⁴

§ 3436. Commander not prosecutor.—The fact that a department commander orders a court-martial does not make him an accuser or prosecutor in the sense of the 72d or 73d Articles of War, nor is he such accuser or prosecutor when, upon information of misconduct, he orders the acting judge-advocate of the department, or the colonel commanding the regiment to institute the proceedings against the offender. But it is not necessary that the commander sign the charges in order to constitute him the accuser or prosecutor. Nor is he regarded as the accuser or prosecutor where he causes the charges to be preferred and convenes the court-martial by direction of the secretary of war or other other competent military superiors.¹⁵

¹⁴ Military Laws of the U. S. 1901, Par. 1790, n.

¹⁵ Dig. Opin. J. A. G., Para. 187, 188, 189.

CHAPTER CLXXII.

PLEADINGS.

Sec.	Sec.
3437. Generally.	3440. Statement of charge.
3438. Certainty.	3441. Time and place.
3439. Charge and specification.	3442. Answer.

§ 3437. **Generally.**—It is not within the scope of this work to give directions and forms in practice or the details of procedure in courts-martial. But it may not be out of place to consider so much of the procedure and of the pleadings as may aid in applying the rules of evidence. The law recognizes that the persons composing courts-martial and those acting as judge-advocates are neither learned in the law nor skilled in the technicalities of pleadings, and it does not require the strictness of statement or the niceties in practice that are imposed and expected in courts where those practicing are learned in the law and skilled in the technicalities of procedure. In courts-martial, therefore, the law is satisfied with a plain statement of the charge and an informal introduction of evidence in such manner as to bring all the essential facts before the court. As in all other courts the law is equally zealous that no injustice shall be done to the accused.

§ 3438. **Pleading—Certainty.**—The rule of pleading with reference to certainty in charges before courts-martial is not essentially different from that in other courts, except that the same degree of certainty is not required. Still the statement must be certain to a common intent, that is, a reasonable amount of certainty is all that is required. If the substance of the charge is fully and accurately stated the technical verbiage, so profuse in criminal indictments, may be dispensed with. On this subject Col. Winthrop says: “The rule as to certainty is, as a general principle, applicable to the military charge in the same manner as to the criminal indictment or declaration of the civil practice, and will properly be observed in framing specifications

Because, however, of the exceptional authority possessed by courts-martial in their findings, of correcting errors and imperfections of detail in specifications, by substituting the true item or term as indicated by the testimony, for the uncertain or incorrect one originally inserted, a military pleading will more readily admit of an uncertain statement (in an allegation for example, as to amount, number, quantity or other particular of description), than will an indictment."¹

§ 3439. Pleading—Charge and specification.—Technically the charge consists of two parts: The first designates the offense by name under the particular article of war; the second the facts by way of specifications substantially sufficient to constitute the alleged offense. It is the office of the specifications to state the particular act done, or omitted, or the precise offense committed by the accused, stating as exactly as possible the time and place. There may be more than one specification, and each specification should set forth but one instance of the offense.² Where the specific offense is charged, and the specification is not sufficient to constitute such offense, the pleading is insufficient. But when the charge and the specification are not inconsistent, they may be taken together, and if,

¹ 1 Winthrop Military Law & Prec. 191.

² McClure Dig. Opinions, §§ 694, 695; 1 Winthrop Military Law & Prec. 209, et seq.; United States v. Runkle, 122 U. S. 543, 7 Sup. Ct. 1141; Hamilton v. McClaughry, 136 Fed. 445. See Military Laws U. S. 1901, note 2, pages 674, 675, 676, 677, 678. For a form of the charge and specification and the finding of the court the following, taken from a recent case in a federal court, is given as a model: Charge—Murder, in violation of the 58th Article of War. Specification—In that Private Fred Hamilton, Troop K, 6th Cavalry, U. S. Army, did wilfully, feloniously, and with malice aforethought inflict a wound on Corporal Charley Cooper, Troop K, 6th Cavalry, deceased, by firing a ball cartridge from a Colt's re-

volver, calibre 38, at said Cooper. From the effect of said wound, the said Cooper died almost immediately, about 8:25 p. m. on the 23d day of December, 1900. This at Camp Reilly, Pekin, China, about 8:25 p. m. on the 23d day of December, 1900." Findings.—Of the specifications: Guilty. Of the charge: Guilty. Sentence.—And the court doth therefore sentence him, Private Fred Hamilton, Troop K, 6th Cavalry, to be dishonorably discharged the service of the United States, forfeiting all pay and allowances due him, and to be confined at hard labor in such penitentiary as the reviewing authority may direct for the period of his natural life. Signed, ———.

Hamilton v. McClaughry, 136 Fed. 445; Runkle v. United States, 122 U. S. 543, 7 Sup. Ct. 1141.

enable the party distinctly to know what he is to answer, and to be prepared to meet it in proof at the trial, and to enable the court to know what it is to inquire into and try, and what sentence it ought to render, and to protect the prisoner from a second trial for the same offense.”⁵

§ 3441. Pleading—Time and place.—The general rule is, as in all pleadings, that the specification should properly charge the time and place. This should be done for two reasons: (1) That it may properly appear that the offense was committed within the period required by the articles of war; (2) in order that the accused may understand the particular act or omission he is called upon to defend. This particularity as to time and place is also important in case of any subsequent trial for the same offense, or for another offense included in the original offense and thus to aid a plea of former acquittal or conviction. But where the exact time or place is not known it is sufficient to state that it occurred on or about a certain date and at or near a certain place. These expressions are ordinarily used in military pleadings for the purpose of indicating a time or place as nearly as can be ascertained, at or during which the offenses charged were supposed to have been committed.⁶

§ 3442. Answer.—The answer of the accused is similar to that in criminal pleading and practice. If there are special matters they should be pleaded. Mr. Greenleaf states the rule on this subject thus: “The prisoner’s answer to the accusation may be by special plea to the jurisdiction of the court; as, for example, that it has been improperly or illegally detailed; or, that it is not composed of the requisite number of officers; or, that the offense is purely of civil and not of military cognizance; or, that he is not of a class of persons amenable to its jurisdiction. Or, he may answer by a plea in bar; such, for example, as that the period of time, within which a prosecution for the offense might be commenced, has already elapsed; or, that he has once been legally tried for the same offense; or, that the proper authority had officially engaged that, on his becoming a witness for the government against an accomplice for the same offense he should not be prosecuted. And if these pleas are overruled, he

⁵ 3 Greenleaf Ev., § 472.

711; 1 Winthrop Military Law &

⁶ McClure Dig. Opinions, §§ 710, Prec. 196, et seq.

CHAPTER CLXXIII.

TRIAL AND FINDINGS.

Sec.	Sec.
3443. Sessions.	3452. Decision and penalty.
3444. Continuance.	3453. Findings—Follow evidence.
3445. Evidence heard in open court.	3454. Finding—On charge and specifications.
3446. Opening statement.	3455. Finding—Exceptions and substitutions.
3447. Swearing witnesses.	3456. Finding—Approval.
3448. Separation of witnesses.	3457. Finding—Approval by the president.
3449. Order of introduction of testimony.	3458. Findings—Disapproval.
3450. Hearing—Record of evidence and objections.	
3451. Questions by members of court.	

§ 3443. **Sessions.**—Following the English custom the statute formerly provided that all sessions of the courts-martial should be held between the hours of eight o'clock in the morning and three o'clock in the afternoon, except in particular cases. But this section has been repealed by the Act of 1901, and the court is not governed by any statutory regulation as to the hours of its session. But it is obvious that the sessions should be so arranged that the judge-advocate may have an opportunity to prepare the daily record. It is evident that the law-makers intended that the sessions of the court-martial should now be determined entirely by the court itself.

§ 3444. **Continuance.**—“A court-martial shall, for reasonable cause, grant a continuance to either party, for such time, and as often, as may appear to be just: Provided, that if the prisoner be in close confinement the trial shall not be delayed for a period longer than sixty days.”¹ The rules in regard to the continuance are very similar to those in general practice in other courts. The court should require a showing that the absent evidence is material and not cumula-

¹ Article 93.

an open statement either for the government or for the accused. It has been said that in complicated cases or where there are numerous charges and specifications that there may be some advantage both to the parties and the court for the judge-advocate to make a brief statement of the testimony intended to be offered to establish the charges and specifications and to state to the court the principles of law applicable to the case. These sometimes simplify and facilitate the trial and aid in the exclusion of collateral and irrelevant matters. The same applies to the statement of the defense where the witnesses are numerous or the points of law complicated. But in both instances argument should be avoided.

§ 3447. Swearing witnesses.—Before proceeding to hear any evidence the witnesses will all be called into the presence of the court and there have administered to them the oath or affirmation. While taking this oath the witnesses should stand with their right hands uplifted. The form of this oath or affirmation is: “You swear (or affirm) that the evidence you shall give, in the cause now in hearing, shall be the truth, the whole truth, and nothing but the truth. So help you God.”⁶ The judge-advocate is authorized to administer the oath.⁷ And the judge-advocate may, where he is a witness, be sworn by the president of the court.⁸

§ 3448. Separation of witnesses.—As in civil or criminal cases the witnesses may be separated and all excluded from the room or the immediate presence of the court except the one called to testify. Before the taking of evidence is commenced the judge-advocate may direct all the witnesses to remain out of the room or out of hearing of the court. The purpose of this is to avoid any collusion or any influence that the testimony of one witness might have upon another who should hear the first and to arrive at the exact truth. This rule of exclusion should apply to witnesses for both sides. However, the rule is seldom applied to expert witnesses as it is not supposed that their testimony would be influenced by that of any other witness.⁹

⁶ Article 92.

⁷ Act July 27, 1892, § 4.

⁸ McClure of Digest of Opinions,
§ 274.

⁹ Winthrop Military Law and
Prec. 125.

ing it is entitled to the collective opinion of the whole court as to its admissibility. And if the question is rejected by the court, the question and its rejection are still entered of record with the proceedings. If a witness wishes at any time before the close of all the testimony to correct or retrace any part of his evidence in which he has been mistaken, he will be allowed to do so; but this must be done by an addition to what he has before stated; and not by way of erasure or obliteration; it being important, in all cases, that the superior authority, which reviews the evidence, should have an accurate, and, as it were, a dramatic view of all that transpired at the trial."¹²

§ 3451. Questions by members of court.—The members of a court-martial sit as the judges and they have the same right to ask questions as judges in civil and criminal cases. While it is not their duty to conduct the examination yet it is their right and privilege to ask questions for the purpose of satisfying their own minds on any matter which is not clear to them. Or any member desiring further information may suggest a question to the judge-advocate or to the counsel for the accused. And the court as such, for the purpose of a more thorough investigation, may call upon the judge-advocate to procure, if practicable, certain material evidence that has not been introduced and may give ample time by adjournment for the production of such evidence.¹³

§ 3452. Decision and penalty.—On the conclusion of the evidence and the argument the court shall proceed to determine by vote as to the guilt or innocence of the accused. This determination shall be by a vote of the members of the court and in giving their votes it is expressly declared that court shall begin with the youngest in commission.¹⁴ It is also provided that no person shall be sentenced to suffer death, except by the concurrence of two-thirds of the members of the court.¹⁵ When the vote is a tie on any charge or specification it is equivalent to a finding of not guilty, a majority being necessary to conviction. But in such cases the record should not state that in consequence of such tie vote the accused was therefore acquitted. The only showing that can be made by the records in such case is that the vote on the charge or specifications was a tie.¹⁶

¹² 3 Greenleaf on Evidence, § 492.

¹³ Article 96.

¹⁴ 1 Winthrop Military Law & Prec. 429, 430.

¹⁵ McClure Dig. of Opinions, § 1364.

¹⁶ Article 95.

numbers.²¹ Where no evidence is introduced the rule is that the finding should conform to the plea. In case an accused should plead guilty to the specification but not guilty to the charge, it then becomes a question of law for the court to determine whether or not the facts alleged in the specification sustain the charge as a matter of law, and if the court determines that they do then it may find accused guilty on such plea of both charge and specification.²²

§ 3455. Finding—Exceptions and substitutions.—Where the court finds the accused guilty of the charge, it also has the power, when the evidence warrants, to find him guilty of a part of the specification only and excepting the remainder. So it has been held that in finding him guilty of the whole, or a part, the court may substitute correct words or allegations in place of such as are shown by the evidence to have been inserted through error. When such exceptions or substitutions make the specification appropriate to the charge and legally sufficient, the accused may then be found guilty of the charge in the usual manner.²³ Instances of the power of the court to except and substitute occur where the name or rank of the accused or other person is erroneously stated, or the averment of time, place, date, amount, quantity or quality is erroneous.²⁴ Another instance of this power of the court to change or substitute is that where the offense stated in the charge includes a lesser kindred offense. Thus under a charge of desertion the court may find the accused guilty of absence without leave and so change the specification. Under such a charge where the evidence fails to establish a desertion but does show an unauthorized absence, the accused should be convicted of this as his actual offense and the court may except such words of the specification as describe the desertion and substitute words describing the lesser offense of absence without leave.²⁵ But this rule will not justify the conviction of an accused of an offense entirely separate and distinct in its nature from the one charged.²⁶

3456. Finding—Approval.—“No sentence of a court-martial shall be carried into execution until the same shall have been approved by

²¹ McClure Dig. of Opinions, § 1354.

²² McClure Dig. of Opinions, §§ 1352, 1353.

²³ McClure Dig. of Opinions, § 1355.

²⁴ McClure Dig. of Opinions, § 1357.

²⁵ McClure Dig. of Opinions, § 1359.

²⁶ McClure Dig. of Opinions, § 1360, et seq.

cient to approve the findings only.³⁴ It seems that the following properly signed by the officer is sufficient: "The proceedings, findings, and sentence are approved."³⁵

3457. Finding—Approval by the President.—The article of war provides that: "No sentence of a court-martial, inflicting the punishment of death, shall be carried into execution until it shall have been confirmed by the President; except in the cases of persons convicted, in time of war, as spies, mutineers, deserters, or murderers, and in the cases of guerilla marauders, convicted, in time of war, of robbery, burglary, arson, rape, assault with intent to commit rape, or of violation of the laws and customs of war; and in such excepted cases the sentence of death may be carried into execution upon the confirmation by the commanding general in the field, or the commander of the department, as the case may be."³⁶ There are certain other classes of cases where the sentence must be approved by the President, thus: "In time of peace no sentence of a court-martial directing the dismissal of an officer shall be carried into execution until it shall have been confirmed by the President."³⁷ It is also provided that "no sentence of a court-martial, either in time of peace, or in time of war, respecting a general officer, shall be carried into execution until it shall have been confirmed by the President."³⁸ The statute provides no form by which the President shall declare his confirmation of the sentence. Nor does it require that such a confirmation shall be signed by the President. It has accordingly been held that under the well established principle that the personal signature of the President is not made essential by law to give effect to executive proceeding; but that the signature of the head of the department to which the subject belongs is sufficient, his act being deemed in law the act of the President.³⁹ But it has been held that the approval of the President must be so authenticated that it will show, otherwise than argumentatively, that such confirmation is the result of the judgment of the President, and that it is not a mere departmental order to which his attention may or may not have been

³⁴ McClure Dig. of Opinions, § 324.

³⁵ Article 108.

³⁶ Hamilton v. McClaghry, 136 Fed. 455.

³⁷ McClure Dig. of Opinions, § 337; 15 Opinions Attorney-General 290;

³⁸ McClure Dig. of Opinions, § 98; Article 105.

United States v. Page, 137 U. S. 673, 11 Sup. Ct. 219.

³⁹ Article 106.

called; in other words, the fact that the confirmation is the act of the President must not be left to inference only.⁴⁰

§ 3458. Findings—Disapproval.—Disapproval of the findings and sentence wholly nullifies them. This disapproval of the sentence is not a mere expression of disapprobation, but it has been held to be a final determinate act; it puts an end to the proceedings, and renders the sentence nugatory and inoperative. If the intervening reviewing officer disapproves the sentence it is not required to be then forwarded to the final or ultimate reviewing officer or person.⁴¹

But the disapproval must be express; the mere absence of approval is held not to amount to a disapproval. The disapproval is held to be tantamount to an acquittal by the court.⁴² A reviewing officer cannot disapprove the sentence or the proceedings and then in any manner change or mitigate the punishment.⁴³ Where the proceedings are erroneous or ill advised, or the sentence inadequate, he may reassemble the court and give his reasons for so doing; but he has no power to add to the penalty or increase the sentence in any manner.⁴⁴

* *Runkle v. United States*, 122 U. S. 543, 7 Sup. Ct. 1141; *United States v. Page*, 137 U. S. 673, 11 Sup. Ct. 219; *United States v. Fletcher*, 148 U. S. 84, 13 Sup. Ct. 84; *Schley's Case*, 14 Green Bag 99, 147. But see *Bishop v. United States*, 197 U. S. 334, 25 Sup. Ct. 440.

⁴¹ *McClure Dig. Opinions*, § 2229.

⁴² 13 *Opinions Att'y-Gen.* 460; *McClure Dig. of Opinions*, § 2229.

⁴³ *McClure Dig. of Opinions*, § 2229.

⁴⁴ *McClure Dig. of Opinions*, § 2231.

CHAPTER CLXXIV.

EVIDENCE GENERAL RULES.

Sec.	Sec.
3459. Generally.	3468. Proof of enlistment.
3460. Rules of evidence.	3469. Documents—Telegrams.
3461. Rules of evidence — Greenleaf's rule.	3470. Degree of proof—Reasonable doubt.
3462. Agency and identity of accused.	3471. Rank of officer—Effect on evidence.
3463. Proof of corpus delicti.	3472. Opinion evidence.
3464. Intent—Proof.	3473. Burden of proof.
3465. Relevancy of evidence.	3474. Burden of proof never shifts.
3466. Documentary evidence.	3475. Character—Proof as to.
3467. Documents—Record of previous trial.	3476. Impeachment of witness.
	3477. Depositions.

§ 3459. **Generally.**—It is not within the scope of this work, under this particular heading, to give in detail all the rules of evidence applicable to trials by court-martial. In the nature of the case this would involve a repetition of a vast amount of material found in the preceding volumes of this work. This would necessarily involve the discussion anew of all such subjects as the relevancy of the evidence, its materiality and competency, the competency of witnesses and parties, presumptions and burden of proof, judicial notice, hearsay, *res gestae* admissions, documentary evidence and all other principles which form the basis of the admissibility of evidence in the trial of civil and criminal cases. It is the purpose herein to consider the rules that are particularly applicable and incident to court-martial proceedings, leaving to the student and the practitioner alike the general rules and principles stated and illustrated throughout the body of this work. If any of these principles are repeated here it is for the purpose of showing their special application in the practice in these tribunals.

§ 3460. **Rules of evidence.**—The rules of evidence in court-martial proceedings are not essentially different from those which

shown that he was the agent, in the commission of the offense; he must be identified as the person who committed the act. This is not regarded as difficult to establish where the accused is well known and the offense was committed in daylight. But where the accused is a stranger, or the offense was committed in the night-time, much difficulty in establishing the agency and the identity of the accused is sometimes experienced; but the law makes no allowance for these, or like difficulties, and satisfactory proof must be made of these distinct facts in order to justify a conviction.

§ 3463. Proof of corpus delicti.—The proof before a court-martial, as in other courts, must establish three propositions: (1) That the act stated in the charge and those, or some of them, as stated in the specifications which constitute the alleged offense, were actually committed; (2) that the accused is the identical person who alone, or with others, committed the offense; (3) that the accused committed the offense with the intent and purpose which bring it within the terms of the charge and the specification. It is a fundamental principle in all criminal proceedings that the body of the crime, the fact that the alleged offense was actually committed, must be established by the proof. There can be no such thing as a conviction for a crime until the proof fully and fairly establishes the fact that such a crime has actually been committed. Whatever the charge and the specifications may be they constitute separate and distinct facts necessary to be established by the proof independently, in a sense, of the other fact that the accused was in any way connected with the alleged crime or offense. This rule is of such binding force that such proof is not dispensed with even in cases of confession by the accused, as the confession alone does not prove what is usually termed the corpus delicti.*

§ 3464. Intent—Proof.—Ordinarily, a criminal intent is necessary in order to constitute crime. And, as a general rule, this intent must be proved. It has been said that crimes are divided into two classes with reference to the element of intent: (1) "Those in which a distinct and specific intent, independent of the mere act, is essential to constitute the offense." To this class belong murder, larceny, burglary, desertion and mutiny. (2) "Those in which the act is the principal feature, the existence of the wrongful intent being simply

* *United States v. Searcey*, 26 Fed. 435; 1 *Winthrop Military Law & Pr.* 474 n.

the files of the war department are admissible in evidence.⁷ "General orders issued from the War Department or Headquarters of the Army may ordinarily be proved by printed official copies in the usual form. The court will in general properly take judicial notice of the printed order as genuine and correct. A court-martial, however, should not, in general, accept in evidence, if objected to, a printed or written special order, which has not been made public to the army, without some proof of its genuineness and official character."⁸

§ 3467. Documents—Record of previous trial.—It sometimes becomes important to make proof of the testimony introduced at a former trial. But it has been held that the record of such former trial is not admissible for this purpose. So the record of a board of investigation ordered in the same case cannot be admitted over the objection of the accused. Except in certain cases provided for by the articles of war, the testimony at a former hearing if desired must be introduced in the same manner as in the original case.⁹

§ 3468. Proof of enlistment.—As shown by a previous section the court must have jurisdiction of the person of the accused. Hence, the proof must show that the accused belongs to a class over which the court-martial has jurisdiction. It must show that he is an enlisted soldier or that he is such a civilian whose conduct for the time being is subject to military control. Proof that the accused is an enlisted soldier may be made by certified copies of the muster rolls from the records in the war department. This is regarded and held as sufficient evidence that the soldier was duly enlisted or mustered into the service and is, therefore, held as a soldier. But such certified copy of the record is subject to rebuttal by proof of fraud or illegality in the enlistment or muster, and the accused may show that he is entitled to a discharge.¹⁰

§ 3469. Documents—Telegrams.—Courts-martial have experienced some difficulty and embarrassment in making proof of the sending or receiving of telegraphic messages. The rule has been established in these courts that the written or printed copy delivered by the company to the person to whom it was addressed is generally admissible

⁷ Winthrop Mil. Law & Pr. 499, et seq.

⁸ McClure Dig. Opinions, § 1293.

⁹ McClure Dig. Opinions, § 1294.

¹⁰ McClure Dig. Opinions, § 1291.

¹¹ McClure Dig. Opinions, § 1293.

mony, it is nearly always possible that the accused may be innocent; on the other hand, though the probabilities may favor his guilt, a material and sensible doubt of the same may exist, of which he is entitled to the benefit. It is to be observed that the general rule indicated applies alike to each of the three main facts required to be made out upon a trial, in order to establish guilt, viz.—the corpus delicti, the identity of the accused with the real offender, and the requisite criminal animus. Each must be proved beyond a reasonable doubt.”¹³

§ 3471. **Rank of officer—Effect on evidence.**—An officer is not excused from testifying as a witness on account of rank. The rules of evidence in these military courts should be applied without regard to rank. And a ranking officer who testifies as a witness for the prosecution may be asked on cross-examination if he has not expressed animosity toward the accused. So he may be asked if he has not made statements out of court, contradictory to, or materially different from the testimony given at the trial. And the officer, as such witness, cannot refuse to answer on the grounds that questions which tend to discredit him are disrespectful.¹⁴

§ 3472. **Opinion evidence.**—The general rules as to expert evidence apply to proceedings and witnesses before courts-martial. The opinions of expert witnesses are competent and admissible when depending on knowledge of special branches of military science. But such opinions are not admissible on general questions of military science where the members of the court-martial are as competent to form the correct conclusions as the witness.¹⁵

§ 3473. **Burden of proof.**—The rule as to the burden of proof is stated by Col. Winthrop as follows: “It is a general rule of evidence that ‘the obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue.’ And upon a criminal trial, where there stands at the threshold the presumption of the innocence of the accused, and the affirmative of the issue is thus necessarily asserted by the government, the burden is imposed upon the prosecution of proving the existence of every material fact required

¹³ 1 Winthrop Mil. Law & Pr. 476. *pel’s Case*, 2 McArthur Ct. Mar. 135;

¹⁴ McClure Dig. Opinions, § 1286, 3 Greenleaf Ev., § 478. As to employment of experts, see Smith, and note.

¹⁵ Gen. Whitelocke’s Case, 2 MacArthur Ct. Mar. 147; Admiral Kerp-
Matter of, 24 Ct. Cl. 209.

by the accused as part of his defense. But this evidence, as in other cases, must be confined to the element of character involved in the charge. As sometimes stated it must be in some degree "apposite to the species of criminality charged." The effect of proof of character is usually to raise a reasonable doubt, on the improbability of a person of such good character committing the offense charged. It is most valuable in doubtful cases. In military cases proof of character is seldom offered as a defense; it is usually intended for the court or the reviewing officer to consider in mitigation of the punishment. For this purpose it is often presented in case of a plea of guilty. When thus offered it is not subject to the ordinary limitations as to time or the element of character involved in the charge. It "may exhibit the reputation or record of the accused in the service; for efficiency, fidelity, subordination, temperance, courage or any of the traits or habits that go to make the good officer or soldier. It need not be limited to general character, but may include particular acts of good conduct, bravery," etc.¹⁸

§ 3476. **Impeachment of witness.**—The general rules as to the impeachment of witness apply in courts-martial. A witness may be impeached, (1) by discrediting him on his cross-examination; (2) by proof of contradictory statements made out of court; (3) by proof showing that his general reputation for truth and veracity is bad.¹⁹ Before proof of contradictory statements can be offered, the witness must first be asked on cross-examination if he did not at a particular time and place make such a statement. In case of denial, the impeaching witness can, at the proper time, be introduced and state what the first witness said. But this evidence of the impeaching witness does not prove any fact; its only purpose is to impeach and discredit the first witness.²⁰

§ 3477. **Depositions.**—Depositions may be taken and read in evidence before courts-martial. The statute excludes depositions, however, in all capital cases; that is in all cases where the death penalty may be assessed. Depositions of only such witnesses as reside beyond the limits of the state, territory or district can be taken.²¹ Deposi-

¹⁸ 1 Winthrop Mil. Law & Pr. 533. Gilp. (U. S.) 60, 11 Fed. Cas. No.

¹⁹ 1 Winthrop Mil. Law & Pr. 526. 6015.

Vol. II, Chap. 45.

²¹ Article 91; McClure Dig. Opin-

²⁰ 1 Winthrop Mil. Law & Pr. 527, ions, § 256; Military Laws of U. S. and notes; Hand v. Elvira, The, (Davis) 744, 745.

CHAPTER CLXXV.

EVIDENCE IN PARTICULAR CASES.

Sec.	Sec.
3478. Absence without leave.	3488. Desertion—Enlistment in enemy's army.
3479. Burglary.	3489. Desertion—Escape.
3480. Conduct to the prejudice of good order and discipline.	3490. Desertion—Pay and forfeitures.
3481. Conduct to the prejudice of good order—Member of court-martial.	3491. Desertion—Defense.
3482. Conduct to the prejudice of good order—On part of officers.	3492. Desertion—Reward for arrest.
3483. Conduct to the prejudice of good order—On part of soldiers.	3493. Drunkenness while on duty.
3484. Conduct unbecoming an officer, etc.	3494. Drunkenness—Proof.
3485. Desertion—Proof.	3495. Embezzlement.
3486. Desertion—Absence without leave.	3496. Embezzlement—Proof and presumption.
3487. Desertion—Penalty.	3497. Enlistment—Proof.
	3498. Fraudulent claims.
	3499. Mutiny—Proof.
	3500. Mutiny—Intent.
	3501. Mutiny—Suppression.
	3502. Relieving the enemy.
	3503. Sleeping on post.

§ 3478. **Absence without leave.**—The Articles of War provide for the punishment of any soldier absent without leave.¹ There is a clear distinction between absence without leave and desertion, and the charge for the latter must be under a separate article.² So, a violation of any one of these articles should be charged under its appropriate number. Thus, a violation of Article 33 should not be charged under Article 32.³ Proof of absence without leave is sufficient to forfeit the offender's pay for the time absent.⁴ But there is no provision for requiring a soldier who has been absent without leave to make good the time lost, as in case of desertion.⁵ On a con-

¹ Articles 31, 32, 33, 34.

² Article 48. See, §§ 3485, 3486.
But see, *Dynes v. Hoover*, 20 How. (U. S.) 65.

³ McClure Dig. Opinions, § 376.

⁴ McClure Dig. Opinions, §§ 375, 378.

⁵ McClure Dig. Opinions, § 375.
See, § 3487.

ticle, or where, though so designated no punishment is assigned for its commission, or where it is doubtful under which of two or more articles the offender should be prosecuted, recourse is had to this comprehensive and serviceable provision as the authority and foundation for the charges and proceedings."¹⁰ The word "crimes," as here used, has been held to mean military offenses of a more serious character than disorders and neglects, and to include such as might be civil crimes, but where no punishment is otherwise provided in the Articles of War. Both terms, "crimes" and "disorders and neglect," are qualified by the phrase "to the prejudice of good order and military discipline." Thus, any crime, not capital, and not mentioned in any other article, would properly be chargeable under this, if it is to the prejudice of good order and military discipline.¹¹

§ 3481. Conduct to the prejudice of good order—Member of court-martial.—Under Article 62 charges may be made against members of a court-martial. Col. Winthrop gives the following list as illustrating the number and character of such charges: "Improperly disclosing the proceedings had in secret session; refusing to vote a punishment after conviction; appearing drunk before the court, or behaving disrespectfully to the court; as a witness failing to comply with a summon; testifying falsely under oath; using disrespectful language, or behaving disrespectfully or contumaciously to the court; as an accused (or counsel for an accused), transcending the privilege of the defense or statement by indulging in unwarrantable strictures upon a superior officer, or gross personalities; attempting to suborn or intimidate a witness; contempt of court, where not punished summarily under Article 86."¹²

§ 3482. Conduct to prejudice of good order, etc.—On part of officers.—The best rules of evidence and the proof required under Article 62 is to be found in the charges which have been made and sustained under this article. The nature of the charge indicates the character of the proof required to sustain it. Col. Winthrop gives the following as examples of the charges made and sustained against officers under this article, with reference to the general order where they may be found: "Neglect to observe, or carelessness in observing,

¹⁰ 2 Winthrop Mil. Law & Pr. 1118.

¹¹ 2 Winthrop Mil. Law & Pr. 1131;

¹² McClure Dig. Opinions, §§ 148, McClure's Dig. Opinions, §§ 148-149. See also, Mason, Ex parte, 105 U. S. 696.

son court to try a capital offense, and putting the members in arrest because the court held that it had no jurisdiction."¹⁸

§ 3483. Conduct to the prejudice of good order, etc.—On part of soldiers.—Col. Winthrop gives the following instance of conduct to the prejudice of good order on the part of enlisted men: "Special neglects or violations of duty on guard, as omission to challenge, in time of war; allowing or suffering prisoners to escape; bringing whiskey into guard-house; improperly relieving sentinels by non-commissioned officer of the guard; mutilating the guard book; escape while in confinement or under arrest, or under sentence; attempt to desert; making preparations to desert; failing to appear on duty with a proper uniform; or appearing with dirty or torn clothing; being offensively unclean in person; failing to appear or appearing drunk before a court-martial, as an accused or as a witness; giving false testimony before a court-martial, or suborning or conniving at false testimony by another attempting to suborn a witness; attempting to intimidate one who was to be a material witness by a threatening letter; refusing to testify at all as a witness; gambling by non-commissioned officers with enlisted men in the guard-house, or in barracks or allowing them to gamble; gambling by one soldier with another; the conducting, by an enlisted man, of a gambling house or table at or near a military post for soldiers to play at; straggling on the march; malingering, or self-maiming; maiming of another soldier; cruel or injurious treatment of his horse by a mounted soldier, or of any public animal by any soldier; malicious destruction of property of civilians; neglect by non-commissioned officer to cause to be punished or tried soldiers under his command who have destroyed or appropriated property of civilians; by lawless conduct causing himself to be arrested, tried and convicted by the civil authorities, thus depriving the United States for a considerable period of the services due under his enlistment; disorderly conduct in a town, inducing arrest by civil authorities; assaulting persons and damaging property on a railway train near a military post; misconduct at target practice; not giving proper attention to his lessons at the post school; neglect of duty by private of hospital corps in caring for patients; failing by a hospital steward to put up prescriptions correctly; refusing to submit to treatment in hospital necessary to render him fit for duty; refusing to submit to a necessary and proper operation directed

¹⁸ 2 Winthrop Mil. Law & Pr. 1128 et seq. and notes.

ornation of perjury; corruptly attempting to induce an officer who was a member of a post council to vote for a particular candidate; the appropriation of food furnished by the government by a surgeon to himself and to his private mess; the violation of a pledge of promise and honor made by one officer to his superior; drunkenness by an officer in uniform at a public place; fighting with other officer in a public place; visiting disreputable gambling houses and gambling.¹⁸ The neglect or refusal to pay honest debts, under certain circumstances, has been held chargeable under this article. Proof of giving a check on the bank when the drawer knew he had no money on deposit; so proof of loaning of money to soldiers of his command at the rate of one hundred per cent., are sufficient to convict under this article.¹⁹ Proof of bigamy, desertion of wife and pretending to marry another woman; or of assaulting, abusing and beating his wife; of the institution of fraudulent divorce proceedings and the manufacture of false testimony; or of abandonment and failure to provide for his wife, are all held to be sufficient evidence under this article.²⁰ So, proof of attempting to alienate the affections of the wife of another officer.²¹

§ 3485. Desertion—Proof.—The Articles of War make a difference between desertion and absence without leave. Desertion is more than absence; it is voluntary absence without the intention of returning. To establish desertion proof of two things is required: (1) The voluntary unauthorized absence and, (2) the intent permanently to abandon the service. The intent may sometimes be inferred, not from the fact of the absence, but from circumstances attending the leaving, and the duration of the absence. Unexplained protracted absence may furnish proof of the intent. To determine whether it is desertion or absence without leave, all the circumstances in connection with the leaving, absence, or return if voluntary or compulsory, should be considered, and each case must be governed by its own peculiar facts. No general rule of proof can be given.²² A charge of desertion on a roll book is no evidence of the

¹⁸ McClure Dig. Opinions, §§ 124-131; G. O. 66 of 1904; G. O. 64 of 1904.

¹⁹ McClure Dig. Opinions, §§ 133-137; G. O. 66 of 1904.

²⁰ McClure Dig. Opinions, §§ 139-141.

²¹ G. O. 63 of 1904. For a very complete list of offenses under this article see 2 Winthrop Mil. Law & Pr. 1107 and notes, et seq.

²² McClure Dig. Opinions, § 1053.

offense. Neither such record nor the hearsay statement of any officer or person can be taken as proof of the fact of desertion.²³

§ 3486. Desertion—Absence without leave.—The offense of absence without leave is included in every charge of desertion. For this reason every trial on a charge of desertion is in fact a trial for absence without leave; and if the proof fails to show a desertion the accused may be convicted of the lesser offense. But a conviction of such lesser offense under such a charge is an acquittal of the greater. So, an acquittal under such a charge without reservation is an acquittal of both grades of offense.²⁴

§ 3487. Desertion—Penalty.—There are two kinds of punishment inflicted on proof of desertion: (1) The accused shall be liable to serve for such period as shall, with the time he may have served previous to the desertion, amount to the full term of his enlistment. (2) He shall be tried by a court-martial and punished, even if the term of his enlistment expired before his arrest and trial.²⁵ It is observed that the time lost by desertion is independent of the punishment and need not be included as a part of the sentence. If the sentence is disapproved, it is equivalent to an acquittal and he is not required to serve the extra time. But he is not entitled to pay during the time of absence.²⁶ The time passed by a deserter in confinement under sentence cannot be computed as a part of the period to be made good under this article, as it is not time of military service. Nor can the time be credited where the sentence is remitted. So, time passed while awaiting trial cannot be computed.²⁷ The usual practice under the weight of authorities is to the effect that the punishment for desertion and the obligation to complete the contract—serve the time of enlistment—are separate and distinct, and that the restoration of a deserter to duty without a trial does not relieve him from his obligation to complete the contract.²⁸ So, where the accused is acquitted of the charge of desertion, or the sentence is disapproved he cannot be charged with the amount of a reward for his arrest.²⁹

²³ McClure Dig. Opinions, § 1056.

²⁴ McClure Dig. Opinions, § 1093.

²⁵ Article 48.

²⁶ McClure Dig. Opinions, §§ 64, 65.

²⁷ McClure Dig. Opinions, § 66.

²⁸ McClure Dig. Opinions, §§ 71,

72.

²⁹ McClure Dig. Opinions, §§ 1074,

1075.

§ 3488. Desertion—Enlistment in enemy's army.—As a general rule proof of the enlistment in the army of the enemy by a prisoner of war is sufficient to sustain a charge of desertion. Such an act is only justifiable when done as a resort to save life, or to escape extreme suffering, or to obtain freedom. When such enlistment is proved, to overcome its force, or to raise a sufficient doubt, the accused must show that the enlistment was for one or more of the purposes stated. The fact that the accused did rejoin his original command has been held to be sufficient evidence of his design in the enlistment in the enemy's army.³⁰

§ 3489. Desertion—Escape.—Proof that a soldier while awaiting trial or sentence escaped, is not proof of desertion. But proof of an escape with other circumstances may be strong proof of desertion. Thus, proof of escape followed by long absence, and where apprehension and forcible return follow, is held to raise strong presumptive evidence of a sufficient intent to constitute the crime of desertion. And where the absence is brief and the return compulsory, the circumstances attending the escape may be such as to justify the presumption of intentional desertion. An escape with the intention of avoiding the confinement and quitting the service is desertion. An escape is an offense for which punishment may be inflicted as for "conduct to the prejudice of good order and military discipline."³¹

§ 3490. Desertion—Pay and forfeitures.—The forfeiture of pay as prescribed by the army regulations,³² can only be imposed upon satisfactory proof of desertion, and conviction by a court-martial and on approval of the sentence; if the sentence be disapproved there can be no forfeiture. If the offender is restored to duty without trial by competent authority, as a deserter, this has been held sufficient to warrant a forfeiture. But a removal of the charge entered by mistake, in orders of the War Department, operates to relieve the accused of all forfeitures charged against him.³³ But it has been held by the highest authority that for the purpose of determining the right of the soldier to receive pay for past services, the desertion need not be established by the sentence of a court-martial. If the fact appears on the muster rolls it is sufficient to justify a withholding of the

³⁰ McClure Dig. Opinions, § 1095.

³¹ McClure Dig. Opinions, § 1062.

³² McClure Dig. Opinions, § 1057.

See also, § 1376 et seq.

³³ Article 129.

surrender manual to entitle the claimant to the reward; mere information is not sufficient.⁴⁴

§ 3493. Drunkenness while on duty.—Officers and soldiers are punished for being intoxicated on duty.⁴⁵ So, drunkenness may be an offense under other articles.⁴⁶ While it is an offense to place a soldier on duty when under the influence of intoxicating liquors, yet this does not relieve him from the penalty, as the article provides for the punishment if the soldier is found drunk on duty.⁴⁷ There can be no conviction under this article where a soldier is intoxicated at the time of drill, or duty, but is too drunk either for the drill or duty. The charge should be under another article.⁴⁸ But an officer reporting in person upon his arrival at a post, in a state of intoxication, is held to be drunk on duty under Article 38. If while intoxicated an officer, as officer of the day, reports to the post commander for orders, after he has been detailed, he is properly chargeable under this article.⁴⁹ A post commander, while present and exercising command as such is on duty at all times within the meaning of this article.⁵⁰ The same rule applies to a medical officer where there are constantly sick persons under his charge.⁵¹ The proof need not show that the accused was utterly incapacitated by reason of the intoxication; it is sufficient if the intoxication is such as to sensibly impair the full and free use of his mental or physical abilities. It is no defense to such a charge that the accused was able to discharge the duty.⁵² The rule is that any intoxication which is sufficient to sensibly impair the rational and full exercise of the mental and physical faculties is an offense under this article.⁵³ And it is not, ordinarily, material how the drunkenness was induced.⁵⁴ It is held to be proper to prove drunkenness as going to the question of the grade of the offense, and especially on the question of intent.⁵⁵ It has been held that intoxication induced by morphine or other drugs prescribed by a medical officer may constitute a sufficient excuse for such breach of discipline.⁵⁶

⁴⁴ McClure Dig. Opinions, §§ 1082, 1083.

⁴⁵ Article 38.

⁴⁶ Article 62.

⁴⁷ McClure Dig. Opinions, § 43; 2 Winthrop Mil. Law & Prec. 944.

⁴⁸ McClure Dig. Opinions, § 44; Article 62.

⁴⁹ McClure Dig. Opinions, § 45.

⁵⁰ McClure Dig. Opinions, § 47.

⁵¹ McClure Dig. Opinions, § 48.

⁵² McClure Dig. Opinions, § 49.

⁵³ McClure Dig. Opinions, § 50.

⁵⁴ McClure Dig. Opinions, § 51.

⁵⁵ McClure Dig. Opinions, § 1233.

⁵⁶ McClure Dig. Opinions, § 1234.

soldier in the army is held to be always in what is termed a fiduciary relation to the government, and unless his position or rank is specially controverted it will not be necessary to prove his commission, appointment or enlistment. His office, rank or position may be proved by general notoriety, by his admissions, or by the orders investing him with a particular character or duty. The fact that he had the possession or custody of the property may be proved by his receipts, or accounts, or by the testimony of the officer or person who paid the money or delivered the property. "The fact of the fraudulent conversion in embezzlement may be evidence by the absconding of the accused with public funds, or his desertion with articles of public property in his possession; by a deliberate falsification, as where the party denies that he has ever received the money or property which has been in fact committed to him; by the rendering of a false return, or account in which the receipt of the money alleged to have been embezzled, is omitted to be acknowledged, or in which a fictitious balance is made to appear, or which is otherwise falsified or purposely mis-stated; by a failure altogether to render an account required by statute, regulation or order by the unauthorized selling, giving, or otherwise disposing of public property to civilians or military persons; by the paying out of public funds to persons not entitled to receive the same; by a neglect to pay sums justly due to employes, contractors, or other public creditors, out of money furnished for the purpose, or to make any other required disbursements; by a neglect to honor proper requisitions for military stores, or a dealing of them out in short or insufficient quantities, notwithstanding that ample supplies have been provided by the government; by a failure to turn over to a successor, on being relieved, the full amount of public property for which the officer is legally accountable; or by any other form of non-performance or mal-performance of the trust devolved upon the party."⁶⁰ It has been held that repeated false statements of the accused in regard to public moneys intrusted to him and for which he was accountable, may be evidence of guilt.⁶¹ To sustain a charge of misappropriation of money or property it is not required to prove that the accused appropriated it for his benefit or profit.⁶²

§ 3496. Embezzlement—Proof and presumption.—The fact of embezzlement may be proved by showing circumstances from which the

⁶⁰ 2 Winthrop Mil. Law & Pr. 1093, 1094; G. O. 3 of 1904. See, G. C. M. O. 34.

⁶¹ McClure Dig. Opinions, § 120.

⁶² McClure Dig. Opinions, § 116.

party from denying the fact on the charge of desertion; so where a person has voluntarily rendered services as an enlisted man and as such has been armed, clothed, fed and kept by the government, this is sufficient to estop him from denying the fact.⁶⁷ And such facts are held sufficient without other proof of enlistment or oath.⁶⁸ So, a return to his regiment and entering upon his duties as a soldier is sufficient evidence of enlistment.⁶⁹ So, acquiescence in an improper assignment and a continuation in the service is a constructive enlistment.⁷⁰ It is no defense to a charge of desertion to plead a void enlistment.⁷¹

§ 3498. Fraudulent claims.—Article 60 deals mainly with fraudulent claims. The prosecutions under this article are based upon the general charge for violation of the article, and upon the particular specifications which must be sufficient to bring the offense within some subdivision of the article. The specifications from one to eight, inclusive, deal with fraudulent claims against the government, and the fraudulent management and accounting of property; they include all acts of a single person in making or presenting false claims, as well as assisting others in making and presenting such claims. In charging the offense it is not necessary to allege an intent to defraud. Proof of the act of misappropriation has been held to be sufficient; the offense is complete irrespective of the motive.⁷² But it has been held that to make the accounts of a United States Marshal fraudulent, guilty knowledge was necessary.⁷³ Such guilty knowledge should not be inferred from the proof of negligence; the proof should show that the accused has knowledge of such circumstances as would induce an ordinarily intelligent and prudent person to believe the claim false.⁷⁴ A person ought not to be held under this article for an honest mistake, but when he seeks to support his claim by certificates and affidavits of persons, who, to the knowledge of the accused, know nothing of the fact to which they certify or depose, it has been held sufficient to establish guilt under this article.⁷⁵ It is a reasonable

⁶⁷ McClure Dig. Opinions, §§ 1252, 1253.

⁶⁸ McClure Dig. Opinions, § 1253; *Lebanon v. Heath*, 47 N. H. 353, 359; *Anderson, ex parte*, 16 Iowa 595, 599; 3 Greenleaf Ev., § 483.

⁶⁹ McClure Dig. Opinions, § 1254.

⁷⁰ McClure Dig. Opinions, §§ 1255, 1256.

⁷¹ McClure Dig. Opinions, §§ 1257, 1258, 1259.

⁷² Article 60; McClure Dig. Opinions, § 111.

⁷³ *United States v. Russell*, 19 Fed. 591.

⁷⁴ *United States v. Shapleigh*, 54 Fed. 126.

⁷⁵ *United States v. Route*, 33 Fed.

The refusal to obey an unlawful order, though done by a combination, will not sustain a charge of mutiny. But the unlawfulness of the act must be manifest and unquestionable to justify the resistance.⁸¹ So, it has been held that resistance to an attempted enforcement of orders by illegal means was not mutiny.⁸²

§ 3500. **Mutiny—Intent.**—It is generally recognized that the intent is the gist of the crime of mutiny. To establish the offense the intent must be proved. Proof of the intent may be made in different ways. It may be shown by proof of declarations, or it may be inferred from conduct. Col. Winthrop says: "The intent may be openly declared in words, or it may be implied from act or acts done; as, for example, from the actual subversion or suppression of the superior authority, from an assumption of the command which belongs to the superior, a rescue or an attempt to rescue a prisoner, a stacking of arms and a refusal to march or do duty, taking up arms and assuming a menacing attitude; or it may be gathered from a variety of circumstances. No one of which perhaps would of itself alone have justified the inference. But the fact of combination, that the opposition or resistance is the proceeding of a number of individuals acting together apparently with a common purpose is, though not conclusive, the most significant, and the most usual evidence of the existence of the intent in question."⁸³ But proof of intent alone is not sufficient to establish the offense. The crime is not made out unless the proof shows some act or acts of opposition or resistance. Proof of words alone cannot convict on a charge of mutiny.⁸⁴

§ 3501. **Mutiny—Suppression.**—An officer or soldier who is present at any mutiny or sedition and does not attempt to suppress it, or who, having knowledge of such mutiny, fails to give immediate in-

Cas. No. 16492; *United States v. Forbes, Crabbe* (U. S.) 558, 25 Fed. Cas. No. 15129; *Thompson v. Stacey Clarke, The*, 54 Fed. 533; 14 Opinion Attorney-General 589.

"McClure Dig. Opinions, § 32; 2 Winthrop Mil. Law & Pr. 897; *United States v. Smith*, 3 Wash. (U. S.) 525, 27 Fed. Cas. No. 16345; *United States v. Borden*, 1 Sprague (U. S.) 374, 24 Fed. Cas. No. 14625.

⁸² 2 Winthrop Mil. Law & Pr. 897;

United States v. Sharp, 1 Pet. (U. S.) 118, 127, 27 Fed. Cas. No. 16264; *United States v. Peterson*, 1 Wood & M. (U. S.) 305, 311, 27 Fed. Cas. No. 16037; *United States v. Smith*, 3 Wash. (U. S.) 525, 27 Fed. Cas. No. 16345.

⁸³ 2 Winthrop Mil. Law & Pr. 895, and notes.

⁸⁴ 2 Winthrop Mil. Law & Pr. 896, 900, and notes.

highest importance in time of war; it is absolutely essential to prevent surprise and capture. In making proof under this charge is first to prove that the accused was duly detailed to post or sentinel duty; this may be done by the proper officer. This is then followed by proof that he was found asleep by some officer, or other person by whom he was so found. It may be difficult to prove the actual fact that the accused was sleeping, especially in the night time. But the law does not require unreasonable things, hence, proof that the accused, while so on guard duty, failed to challenge the person approaching the post; that he was found lying down, sitting or reclining—in some position in which he could sleep; or that he was breathing hard, or snoring, was not aroused until touched, and was then stupid; or that he was not holding his gun, any and all such facts and circumstances may be given in evidence as tending to establish the charge, and from which the fact of sleep may be presumed.⁹¹ It is no defense to such a charge that the accused was irregularly posted as a sentinel; or that he had previously been overtaxed by extra guard duty; or that similar offenses had been overlooked. But in such cases it is proper to show any extenuating circumstances, or any facts that might mitigate the punishment.⁹²

⁹¹ McClure Dig. Opinions, § 55;
2 Winthrop Mil. Law & Pr. 952.

⁹² 2 Winthrop Mil. Law & Pr.
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